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Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

FOREST L. DARBY,

Petitioner,

v.

A-BEST PRODUCTS CO, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Supreme Court of Ohio conducted proper preemption analysis, as directed by this Court, in holding that Congress, through the Boiler Inspection Act, 49 U.S.C. §§ 20701, *et seq*., clearly and manifestly intended the Act to preempt state-law tort claims against manufacturers of railroad locomotives.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, Old Orchard Industrial Corporation, successor-in-interest to Vapor Corporation, and Viad Corporation, successor-in-interest to Baldwin-Lima-Hamilton Inc., were parties in the proceedings below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Forest L. Darby respectfully petitions for a writ of certiorari to review the judgment of The Supreme Court of Ohio.

JUDGMENT FROM WHICH REVIEW IS SOUGHT

The judgment from which review is sought is reported at 102 Ohio St.3d 410 (2004), and is reproduced in the Petition Appendix ("App.") at 1a-19a; the court of appeals decision is not reported and is reproduced at App. 22a-35a; the order of the trial court is not reported and is reproduced at App. 36a.

STATEMENT OF JURISDICTION

The Supreme Court of Ohio entered judgment on July 28, 2004. This Court has jurisdiction under 28 U.S.C. § 1257 and *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

STATUTES INVOLVED

Relevant portions of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51, *et seq*. and the Locomotive Boiler Inspection Act ("BIA"), 49 U.S.C. §§ 20701, *et seq*. (formerly codified as 45 U.S.C. § 23), are reproduced at App. 37a-42a.

STATEMENT OF THE CASE

On January 29, 1999, Petitioner Forest L. Darby, brought suit in the Court of Common Pleas for Cuyahoga County, Ohio against multiple parties seeking damages for injuries incurred as a result of his exposure to asbestos and asbestos-containing products while working as a locomotive engineer for the CSX Railroad. Mr. Darby brought his claim alleging: (1) breach of implied warranty of good and merchantable quality and fitness for the particular intended use; (2) that the Respondents

manufactured and sold products which were in a defective condition and unreasonably dangerous; and (3) that the Respondents' products were defective due to inadequate warning.

On November 2, 2000, Petitioner sought leave to amend his complaint in the Court of Common Pleas for Cuyahoga County to add several new party defendants. Three of the new party defendants, Viad Corporation, Vapor Corporation, and Baldwin-Lima-Hamilton Inc., were manufacturers and/or suppliers of locomotives containing asbestos products to which Mr. Darby was exposed. These entities opposed the motion to amend arguing that federal law preempted the Petitioner's state law tort claims.

The trial court, without opinion, denied Petitioner's motion for leave to add the locomotive manufacturers Viad Corporation, Vapor Corporation, and Baldwin-Lima-Hamilton Inc., but granted leave to add the remaining new party defendants. App. 36a. Thereafter, Petitioner appealed to the Court of Appeals for Cuyahoga County, Ohio, Eighth Appellate District, which affirmed, holding that the Locomotive Boiler Inspection Act ("BIA"), 49 U.S.C. §§ 20701, *et seq.*,[1] "completely preempted state law on requirements imposed upon locomotive parts, or materials used in such parts." App. 26a. The Petitioner then

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1. In 1994, the BIA, originally codified as 45 U.S.C. § 23, was codified as amended to 49 U.S.C. §§ 20701, *et seq.*, and became known as the Locomotive Inspection Act. As a result of the name change, it is referred to in various courts as the Boiler Inspection Act ("BIA"), the Locomotive Inspection Act ("LIA"), and the Locomotive Boiler Inspection Act ("LBIA"). Regardless of which name or abbreviation is used to refer to the act, the LIA is to be interpreted through past cases interpreting the meaning of the BIA. *Weaver v. Missouri Pacific Railroad Co.*, 152 F.3d 427, 430 (1998). For the sake of clarity, Petitioner is using the abbreviation BIA throughout.

appealed to the Supreme Court of Ohio, which agreed with the court of appeals that Petitioner's claims were preempted by the BIA.[2] App. 4a-5a.

The Supreme Court of Ohio did not follow this Court's directives concerning proper preemption analysis. As a result, its decision was incorrect. Therefore, this Court should accept this petition. Significantly, the Supreme Court of Ohio ignored the strong presumption against preempting state laws in the traditional police power areas of health and safety and that Congress's intent to do so must be clear and manifest. *See CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993); *Rice v. Santa Fe Railroad Co.*, 331 U.S. 218, 230 (1947). Moreover, the Supreme Court of Ohio failed to examine each of Petitioner's common-law claims to determine whether each claim was in fact preempted. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 523-524 (1992). Furthermore, the Supreme Court of Ohio failed to return to the language and legislative history of the BIA in order to determine if Congress clearly and manifestly intended to preempt each of the petitioner's state common law claims.[3] *See Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996).

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2. Although Petitioner's appeal was based on the trial court's denial of the motion for leave to add new parties filed pursuant to Ohio Rules of Civil Procedure, Rules 15, 20 and 21, the Supreme Court of Ohio reviewed the substantive issue of preemption of state common law tort claims because it concluded "that the trial court had no justification for refusing to add the new parties as defendants other than the applicability of a valid preemption defense." App. 11a.

3. If a court's preemption analysis leaves questions unanswered, subsequent courts must return to the federal statute itself and ascertain congressional intent, not rely on inferences that might be extracted from judge made common law. *See, e.g., Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996); *English v. General Electric Co.*, 496 U.S. 72, 78-79 (1990); *see also* Laurence H. Tribe. *American Constitutional Law*, (Cont'd)

Instead of conducting precise statutory construction analysis, the Supreme Court of Ohio improperly relied on inferences extracted from *Napier v. Atlantic Coast Line*, 272 U.S. 605 (1926). *Napier* held that two state statutes mandating safety equipment in addition to that required by the BIA were preempted because they intended to occupy the field of regulating locomotive equipment, a power that Congress delegated to the Interstate Commerce Commission. *Id.* at 607.[4]

Napier concerned state legislation, not common law. It concerned two state statutes intending to require additional safety devices on locomotives. Clearly, such an attempt by the states infringed upon the authority of the Interstate Commerce Commission to prescribe uniform safety equipment for locomotives under the BIA. The *Napier* Court, therefore, found that the BIA preempted the state legislation that was attempting to require additional safety devices. But, the issue here involves a separate and distinct state common law claim based in tort.

As the dissent in the Supreme Court of Ohio provided:

> [t]his case is not *Napier*. Here, we are not dealing with legislative regulation of specific equipment. We are dealing with tort liability for injuries allegedly

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(Cont'd)

(3d ed. 1999), § 6-28, p.1177 (preemption analysis is "a matter of precise statutory construction rather than an exercise in free-form judicial policymaking").

4. The statutes at issue in *Napier* were a Georgia statute requiring any locomotive operating within the state to be equipped with an automatic door to the firebox and a Wisconsin statute requiring all operating locomotives within the state to be equipped with a cab curtain. Today, the Federal Railroad Administration ("FRA") regulates railroads under the auspices of the Secretary of Transportation.

> caused by a product that is no longer in use. The effect on interstate commerce is nil.
>
> * * * *
>
> Since plaintiffs' tort action for injuries allegedly caused by asbestos exposure would have no effect on the design, construction, or material of locomotives now in use, there is no danger of state common law intruding into the federal domain. The preemption doctrine exists to protect the federal governments's niche, not to protect a certain industry from the common law of states.

(Pfeiffer, J., dissenting), App. 18a-19a.

In its analysis of the preemptive scope of the BIA, the Supreme Court of Ohio merely cited to *Napier*, a case that did not even address state common law claims, and cited to subsequent cases that likewise relied solely on *Napier*, but did not follow this Court's directives concerning proper preemption analysis. Specifically, the Supreme Court of Ohio cited to a recent West Virginia case, *In re W. Virginia Asbestos Litigation*, 215 W.Va. 39, 592 S.E.2d 818, 822 (2003), which held that through the BIA, Congress occupied the field of railroad safety so pervasively as to justify preemption of that field. App. 15a-16a. But that West Virginia court did not conduct proper preemption analysis either; it merely relied on *Napier*. *See In re W. Virginia Asbestos Litigation*, 592 S.E.2d at 824. The Ohio Supreme Court, followed the rationale of this West Virginia court and agreed with *Law v. General Motors Corporation*, 114 F.3d 908 (9th Cir. 1997), providing:

> We agree, [that the BIA preempts every state effort to establish independent standards for the design, construction and materials of locomotives] and

> similarly hold that Darby's claims against locomotive manufacturers are wholly futile. The Federal Locomotive Boiler Inspection Act, Section 20701 et seq., Title 49, U.S. Code, preempts state-law tort claims against the manufacturers of railroad locomotives asserting injury caused by exposure to asbestos contained in railroad locomotives.

App. at 17a.

Law involved injured railroad employees seeking to recover from locomotive part manufacturers through state common law tort claims. In holding that these claims were preempted by the BIA, the *Law* Court focused on what it interpreted as one of the underlying purposes of the BIA, uniform federal railroad regulation. *Law*, 114 F.3d at 911-12. The *Law* Court stated: "[i]f each state were to adopt differing liability triggering standards, manufacturers would have to sell locomotives and cars whose equipment could be changed as they crossed state lines * * * [t]his would transfer the regulatory locus from the Secretary of Transportation to the state courts." *Law*, 114 F.3d at 911-12. But, the BIA's prominent objective is promoting railroad safety and its concern for uniformity is not unyielding. As the dissent in the case *sub judice* noted, allowing state common law tort claims for asbestos exposure will not have any impact on the uniformity of the BIA since asbestos is no longer used in locomotives.

The Supreme Court of Ohio did not conduct proper preemption analysis as directed by this Court. Therefore, this Court should grant the Petitioner's petition for writ of certiorari in order to correct the Supreme Court of Ohio's improper preemption analysis and allow Petitioner's state common law claim to proceed.

A. Statutory Background

The BIA was enacted in 1911 as an amendment to the Federal Employers' Liability Act, 45 U.S.C. §§ 51, *et seq.* ("FELA") (FELA provides the exclusive remedy for recovery of damages by a railroad employee against a railroad carrier). The BIA is a penal statute that imposes fines on railroads for failure to comply with its terms. The BIA, 49 U.S.C. § 20701 provides:

> A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances–
>
> (1) are in proper condition and safe to operate without unnecessary danger of personal injury;
>
> (2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter; and
>
> (3) can withstand every test prescribed by the Secretary under this chapter.

The BIA was enacted as an amendment to the FELA in order "to promote safety in every area of railroad operations and reduce railroad accidents and incidents." 49 U.S.C.A. § 20701; *See, e.g., Urie v. Thompson*, 337 U.S. 163, 188-191 (1949); *Lilly v. Grand Trunk Western*, 317 U.S. 481 (1943). The section titles of the BIA further indicate that its primary purpose is safety: "Title 49 Transportation Subtitle V Rail Programs Art A. **Safety** Chapter 207 Locomotives." (Emphasis added.) 49 U.S.C. § 207. The BIA does not, in itself, create a cause of action in favor of employees. Rather, if a violation of the BIA occurs, such is negligence *per se* under the FELA and a

cause of action can be brought under that Act. *See McCarthy v. Pennsylvania Railroad*, 156 F.2d 877, 879 (7th Cir. 1946). But, only employees of the railroads can bring a FELA action. 45 U.S.C. §§ 51, *et seq*.

In its original codification, the BIA provided: (1) that it applied to any common carrier or carriers (defined as railroads), engaged in the transportation of passengers or property by railroad; (2) that it was unlawful for any common carrier to use any locomotive unless its boiler and appurtenances were in proper condition and safe to operate. *See* 61st Cong., Sess. III, Chap. 103 (February 17, 1911). In 1915 and again in 1924, the BIA was amended to include the entire locomotive and all of its parts, but the Act still only applied to railroads. It was only in 1988, long after the Petitioner in this case was exposed to Respondents' asbestos-containing products, that the BIA was amended by adding the language "any person," which was defined as including manufacturers.[5] *See* U.S. Public Laws, 100th Cong., 2nd Sess., PL 100-342, 1988 (S1539) at § 14(7)(a).

Although the 1910 legislative bill contained a penalty provision that would have applied to "any common carrier or any seller of a locomotive boiler," the BIA, as passed by

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5. But, Petitioner was exposed to asbestos from Respondents' locomotives prior to 1988. The doctrine of *ex post facto*, therefore, prevents Petitioner from successfully pleading a cause of action against locomotive manufacturers under FELA for any negligence prior to 1988. *See Portley v. Gossman*, 444 U.S. 1311, 1312, 100 S. Ct. 714 (1980) ("the prohibition of *ex post facto* laws is intended to secure substantial personal rights from retroactive deprivation"). Despite this, Respondents are trying to retroactively apply the BIA's coverage of "any person" as a defense mechanism to shield itself from liability. If Petitioner cannot use the BIA to file a claim against the Respondents for acts or omissions prior to 1988, Respondents should not be able to use the same federal enactment as a defensive shield.

Congress in 1911, excluded sellers. *Scheiding v. General Motors Corp.*, 22 Cal.4th 471, 486, 993 P.2d 996, 1005 (2000) (Mosk, J., dissenting); *Compare* S.236, 61st Cong., 1st Sess., § 4 (February 14, 1910) *with* 61st Cong., Sess. III, Chap. 103, § 9 (February 17, 1911). Therefore, as enacted, the BIA expressly applied only to common carriers (defined as a railroad) and its officers, agents, and employees, engaged in transportation by railroad. 61st Congress, Sess. III, Chap. 103, § 1 (February 17, 1911). The decision to exclude "locomotive sellers" from the ambit of the BIA strongly suggests that Congress did not intend to provide locomotive manufacturers with any preemptive immunity from state tort claims.

Further, the overall structure of the BIA also supports the conclusion that it applies only to railroad carriers. As the court in *Lorincie v. Southeastern Pennsylvania Transp. Auth.*, 34 F.Supp.2d 929, 934 (E.D. Pa. 1998), explained:

> it is clear that the BIA as a whole establishes a regulatory framework within which carriers and the Secretary of Transportation – but not railroad manufacturers – operate. Nothing about the structure of the BIA indicates that Congress intended to bring railroad manufacturers within its regulatory web, let alone to preclude state common law actions against railroad manufacturers * * * * The statute's text does not mention railroad manufacturers, its structure does not invite reading them into it, and federalism and history counsel leaving them out.

Id. at 934.

But, as a result of the decision of the Supreme Court of Ohio, employees of railroads, as well as passengers and bystanders, are denied a remedy against railroad equipment

manufacturers for injuries caused by any flaws in the design or manufacture of a product, no matter how egregious. Such absolute immunity for manufacturers produces a result contrary to the congressional purpose of the BIA, which was enacted to increase safety for workers and passengers on railroads. *See Lilly* (1943), 317 U.S. 481; *Urie*, 337 U.S. at 182. (both finding that the BIA must be liberally construed in light of its prime purpose, which is the protection of employees and others by requiring the use of safe equipment). The BIA, by its plain language and its legislative history, does not apply to railroad equipment manufacturers. Therefore, Respondents herein cannot assert immunity from state law tort claims on the basis of a federal enactment, the BIA, to which it is a stranger.

B. Factual Background

Mr. Darby worked as a locomotive engineer for the CSX Railroad in the Russell, Kentucky from 1961 until January of 2002. From 1961 until 1974, Mr. Darby worked in an off-line repair facility servicing and transporting locomotive engines and other parts. Throughout his employment with CSX, Mr. Darby was frequently exposed to Respondents' defective asbestos-containing products.

In September of 1998, Mr. Darby was diagnosed with the disease asbestosis. Asbestosis is a "chronic lung disease caused by the inhalation of asbestos fibers that results in the development of alveolar, interstial, and pleural fibrosis * * * * [t]he disease is progressive: shortness of breath develops eventually into respiratory failure." Kenneth N. Anderson *et al. Mosby's Medical, Nursing and Allied Health Dictionary*, (Fifth Ed., Mosby 1998).

C. Proceedings in the Courts Below

On December 15, 2000, Respondent Viad Corporation, successor to Baldwin-Lima-Hamilton Inc., filed its memorandum in opposition to Petitioner's motion to amend the complaint, contending that any state common law claim against it was preempted by the BIA.

On February 9, 2001, the Petitioner filed a reply brief in opposition to Respondent Viad's memorandum asserting that the BIA did not preempt Petitioner's state law tort claims. On March 5, 2001, the Respondent Viad submitted a reply memorandum addressing the arguments in the Petitioner's reply brief. On April 5, 2001, the trial court held a hearing on the motion to amend complaint and add new party defendants. Counsel for both Petitioner and Respondents presented oral arguments in support of their respective positions. Thereafter, the trial court issued a final appealable Order on May 7, 2002, overruling Petitioner Darby's motion to amend complaint and add new party defendants as to Viad, Vapor, and Baldwin-Lima-Hamilton. App. 36a.[6]

Subsequently, on May 8, 2002, Petitioner filed its notice of appeal in the Court of Appeals for Cuyahoga County, Ohio, Eighth Appellate District. The parties fully briefed the issues and presented oral arguments. On December 19, 2002, the court of appeals affirmed the trial court's ruling finding that the BIA occupied the entire field of locomotive safety and therefore it preempted Petitioner's state common law tort claims. App. 22a-35a.

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6. The trial court issued its opinion on the Court of Common Please, Cuyahoga County's electronic filing service on April 11, 2002, but it was not received for filing by the clerk of courts until May 7, 2002.

Thereafter, on February 11, 2003, Petitioner filed its notice of appeal with the Supreme Court of Ohio. The Supreme Court granted jurisdiction to hear the case and allowed the appeal on May 16, 2003. After consideration of the merit briefs of all parties involved, the Supreme Court of Ohio affirmed the opinion of the Court of Appeals for Cuyahoga County and filed its Judgment Entry on July 28, 2004. 1a-19a. Petitioner files this petition for writ of certiorari urging this Honorable Court to grant the petition as the decision of the Supreme Court of Ohio on the scope of the field preempted by the BIA conflicts with relevant decisions by this Court.

REASONS FOR GRANTING THE PETITION

The preemption doctrine is derived from the Supremacy Clause, Article VI of the Constitution, which provides that the laws of the United States "shall be the supreme Law of the Land; * * * any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." Art. VI, cl. 2. The Supremacy Clause is designed to prevent the states from interfering with federal law and policy. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). But, as independent sovereigns in the federal system, the United States Supreme Court has "long presumed that Congress does not cavalierly pre-empt state-law causes of action." *Medtronic*, 518 U.S. at 485. In fact, preemption is disfavored "in the absence of persuasive reasons either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." *Chicago & N.W. Tr. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981).

In addition, this Court calls for a narrow interpretation of Congress' intent concerning preemption, as that level of analysis "is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety."

Medtronic, 518 U.S. at 485. Importantly, the party claiming preemption has the burden to prove Congress' intent to preempt a particular state action. *DeCanas v. Bica*, 424 U.S. 351, 357 (1976); *see also*, *Medtronic*, 518 U.S. at 486. Moreover, the issue of preemption must always be determined on a case-by-case basis. *Pennsylvania R.R. Co. v. Public Service Comm'n*, 250 U.S. 566, 569 (1919); *People of State of California v. Zook*, 336 U.S. 725 (1949)

I. THE RULING BELOW IMPROPERLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW CONCERNING THE FIELD PREEMPTIVE SCOPE OF THE BIA THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The BIA does not preempt the state common law tort claims herein because Congress, through the BIA, did not clearly and manifestly intend to preclude such claims. As demonstrated below, the trial court, the court of appeals and the Supreme Court of Ohio herein have incorrectly relied on *Napier v. Atlantic Coast Line*, 272 U.S. 605 (1926), as the controlling law in their decisions.

A. *Napier v. Atlantic Coast Line* Is Not Applicable.

Napier did not address the issue herein; and it follows, therefore, that it did not ask, let alone answer, the appropriate questions relevant to determining whether the BIA preempts state common law. By relying on *Napier*, which did not even address state common law claims, the lower courts did not follow this Court's directive and return to the BIA itself to ascertain whether Congress clearly and manifestly intended to preempt state common law. Instead the lower courts relied on improper inferences extracted from *Napier*.

Neither the *Napier* Court, nor the United States Supreme Court in any subsequent decision, have specifically addressed the issue presented herein. The issue in *Napier* was "whether the Boiler Inspection Act has **occupied the field of regulating locomotive equipment used on a highway of interstate commerce, so as to preclude state legislation**." (Emphasis added.) *Id.* at 607. The United States Supreme Court held that the state statutes at issue in *Napier* were preempted because they intended to occupy the field of regulating locomotive equipment, a power that Congress, through the BIA, had delegated to the Interstate Commerce Commission. *Id.*[7] In finding preemption, the *Napier* Court held:

> that **state legislation is precluded, because the Boiler Inspection Act**, as we construe it, **was intended to occupy the field** * * * * Because the standard set by the Commission must prevail, requirements by the States are precluded, however commendable or however different their purpose. (Emphasis added.)

Id. at 613. But, the issue presented herein is distinct from *Napier*. Specifically, it is whether the Boiler Inspection Act's occupation of the field of locomotive regulation includes state common-law actions, based in tort, against a railroad equipment manufacturer.

The *Napier* court did not even address the preemptive impact of the BIA upon state common law claims in general, or suits against railroad equipment manufacturers in particular. The Ohio Supreme Court, by extending the holding in *Napier*

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7. The statutes at issue in *Napier* were a Georgia statute requiring any locomotive operating within the state to be equipped with an automatic door to the firebox and a Wisconsin statute requiring all operating locomotives within the state to be equipped with a cab curtain.

to hold that the BIA preempts state common law claims, improperly converted the preemption analysis from one of congressional intent to one of judicial policymaking. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996); *English v. General Electric Co.*, 496 U.S. 72, 78-79 (1990); Tribe. *American Constitutional Law*, at 1177.

Furthermore, Congress could not have possibly clearly and manifestly intended that the BIA would preempt common law claims by railroad employees against locomotive manufacturers because such claims did not exist in 1911. At that time, a railroad employee had no right of action against a manufacturer under the then prevailing strict privity doctrine which provided that only the immediate buyer of a product could recover for injuries caused by a defect. *See Lonzrick v. Republic Steel Corp.*, 6 Ohio St.2d 227 (1966); *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (1963); *Vandermark v. Ford Motor Co.*, 391 P.2d 168 (1964). Moreover, the doctrine of strict product liability was not established until the 1960s. Thus, at the time the BIA was enacted, and *Napier* was decided, a railroad employee would have had no right to bring a cause of action against the manufacturer. Therefore, the "field" referred to in *Napier* cannot reasonably be construed to include the then non-existent tort liability against locomotive manufacturers.

Nothing in *Napier* supports the proposition that the BIA preempts a state law products liability lawsuit for injuries caused by defective locomotive equipment. Such a lawsuit does not seek to impose any liability for locomotive equipment that a railroad carrier deploys in a manner required by the BIA, and therefore does not attempt to regulate conduct in a field Congress has occupied. Therefore, the field referred to in *Napier* cannot reasonably be construed to include tort liability against non-railroad entities that was nonexistent at the time Congress enacted the BIA.

B. The Supreme Court of Ohio Did Not Follow This Court's Directives Concerning Proper Preemption Analysis.

As demonstrated above, the field from *Napier* does not, and could not, include the preemption of state common law tort claims based on exposure to asbestos and asbestos-containing products. Even though this Court has not heard a case involving the scope of the BIA's preemptive reach upon state common law tort claims, recent cases dealing with preemption indicate that such suits should not be preempted.

Preemption analysis has changed drastically since the United States Supreme Court decided *Napier* in 1926. At that time, the United States Supreme Court tended to avoid detailed preemption analysis by invalidating state legislation under the theory of "mutual exclusivity." *See, e.g.*, Note, *A Framework for Preemption Analysis* (1978) 88 Yale L.J. 363, 375-376, 377. As Professor Tribe observed:

> Over time, however, the Court tempered its undifferentiated – and, in hindsight, wholly unjustifiable – hostility to state regulation of matters already regulated by the federal government. Generally speaking, the Court has come to uphold state regulations that supplement federal efforts so long as compliance with the letter or effectuation of the purpose of the federal enactment is not likely to be significantly impeded by the state law.

Tribe. *American Constitutional Law* at 1195-1196.

For instance, this Court has recognized the distinction between state positive laws, such as legislative acts and regulations, and state common law such as the tort claims at issue herein. In *Cipollone*, this Court noted that "there is no

general, inherent conflict between federal preemption of state [regulatory] warning requirements and the continued vitality of state common law damages actions." *Cipollone*, 505 U.S. at 518 (plurality); *Id.* at 533-534 (Blackmun, J., concurring). In fact, the *Cipollone* Court repeatedly noted that the word "regulation" is a reference only to positive law and not to common law duties of damages liability. *Id.* 513 U.S. at 505, 519, 523. Likewise, in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), this Court found that tort awards were not part of the field preempted by the Atomic Energy Act (42 U.S.C. §§ 2011, *et seq.*) even though such awards can be seen "as regulatory in the sense that a nuclear plant will be threatened with damages liability if it does not conform to state standards." *Id.* at 256.

In *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002), this Court provided that even if the statute at issue therein expressly occupied the field with respect to state positive laws and regulations, its structure and purpose did not indicate a clear and manifest intent to "go even further and implicitly pre-empt all state common law relating to boat manufacture." *Id.* at 69. Additionally, in *Sprietsma*, this Court held that a field reserved for federal regulation, or positive law, did not necessarily include state common law. *Id.* at 69-70. Thus, in recent cases, this Court has clarified that even if the field preempts state positive laws, it does not necessarily follow that the field preempts state common law. Congress must have clearly and manifestly intended for the statute at issue to preempt state common laws. *Id.*

Important to the analysis herein, the *Sprietsma* Court discussed two previous preemption cases that had held that Title II of the Ports and Waterways Safety Act of 1972 ("PWSA"), a federal regulation mandating the "design, construction, and operation"of sea-faring vessels, implicitly

preempted the power of the state of Washington to impose different and higher design requirements on these vessels.[8] *Id.* at 68-69. As this Court explained in *Locke*, the *Ray* Court used a field preemption analysis and found that the rules at issue ("design, construction, and operation" of sea-faring vessels) encompassed a "field reserved for federal regulation" and "Congress ha[d] left no room for state regulation of these matters." *Locke*, 529 U.S. at 111.

It would appear then, that since the United States Supreme Court found that the PWSA occupies the "field" of the "design, construction, and operation of the covered vessels" and that "Congress left no room for state regulation of these matters" that, as the Ohio Supreme Court held in the case *sub judice*, that state common law claims would be preempted. But, such an assumption would be incorrect. For this Court in *Sprietsma* held that "neither Title II of the PWSA nor the holding in either *Ray* or *Locke* purported to preempt possible common-law claims." *Sprietsma*, 537 U.S. at 69.

The language from the PWSA is very similar to the broad language in *Napier* concerning "the design, the construction, and the material of every part of the locomotive." Presumably, it was this broad and sweeping language concerning the design, construction and material of every part and appurtenance of a locomotive that was used by the Supreme Court of Ohio herein to find preemption. The Supreme Court of Ohio, however, did not conduct the proper analysis mandated by the recent decisions of this Court. They simply took the broad and wide sweeping language dealing with state positive laws found in *Napier* and stretched it to apply to state common law. But, as this Court has made perfectly clear in *Cipollone*, *Silkwood*, and *Sprietsma*,

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8. *See United States v. Locke*, 529 U.S. 89 (2000); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978).

such a stretch is improper.[9] The BIA does not contain a "clear and manifest" intent, either expressly or implicitly, indicating that it preempts state common law tort claims.

C. Petitioner's State Common Law Claims Herein Would Not Have a Direct and Substantial Effect On the Regulation of Locomotives.

Further evidence of the modern approach to preemption analysis, this Court has directed that the traditional three preemption categories are not rigidly distinct. *English v. General Electric Co.*, 496 U.S. 72, 79-80, fn. 5 (1990). In this modern analysis, field preemption may be understood as a species of conflict preemption. *Id.* Once an implied federal domain has been properly defined, a particular state remedy falls within that implied field only if the state remedy would conflict with or otherwise substantially impinge upon Congress' objectives in enacting the federal legislation. *Id.* at 79. *English* provides the test for determining whether the preempted field includes the particular tort claim at issue: would a recovery for the plaintiff under the state claim conflict with or otherwise have a "direct and substantial effect" on the regulated matter? *Id.* at 85. But, the Supreme Court of Ohio did not even cite to *English*, let alone apply this test.

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9. The issue of preemption must always be determined on a case-by-case basis. *Pennsylvania R.R. Co. v. Public Service Comm'n* (1919), 250 U.S. 566, 569; *People of State of California v. Zook* (1949), 336 U.S. 725. If a court's preemption analysis leaves questions unanswered, subsequent courts must return to the federal statute itself and ascertain congressional intent, not rely on inferences that might be extracted from judge made common law. *See, e.g., Medtronic*, 518 U.S. at 486; *English*, 496 U.S. at 78-79; see also Laurence H. Tribe, *American Constitutional Law* (3d ed. 1999), § 6-28, p.1177 (preemption analysis is "a matter of precise statutory construction rather than an exercise in free-form judicial policymaking").

In *Silkwood*, this Court faced an issue very similar to the question presented herein, *i.e.*, whether a preempted field, previously held to encompass state legislation and regulation, was so pervasive as to include common law damages as well. In addressing the question, this Court balanced the objectives of the Atomic Energy Act (42 U.S.C. §§ 2011, *et seq.*) with the common law rights of an individual injured from radiation exposure. *Silkwood*, 464 U.S. at 282. The Court recognized that the field of preemption was not without boundaries. Even though the Atomic Energy Act occupied the entire field of nuclear safety so as to preclude state enactments, the field "does not extend as far as [defendants] would have it" and therefore did not preempt a state tort claim for radiation poisoning. *Id.* 464 U.S. at 249.

The *Silkwood* Court held that the parameters of a preempted field "should not be judged on the basis that the Federal Government has so completely occupied the field of safety that state remedies are foreclosed but on whether there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objectives of the federal law." *Silkwood*, 464 U.S. at 256. Even though the Court earlier, in *Pacific Gas & Elec. Co. v. State Energy Resources Conserve & Develop. Commission*, 461 U.S. 190 (1983), had held that the Atomic Energy Act preempted *all* state safety regulation of nuclear power plants, the *Silkwood* Court examined the legislative history of the Atomic Energy Act and determined that there was no indication of congressional intent to preclude state tort law claims. *Silkwood*, 464 U.S. at 251-252.[10]

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10. It is worth noting that the *Silkwood* Court did not rely solely on the rationale and analysis in *Pacific Gas & Elec. Co.* in reaching its decision. Rather, the Court, following proper preemption analysis, returned to the language and legislative history of the statute in order to

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Six years after *Silkwood*, this Court in *English*, confirmed its hesitancy to find preemption of common law claims. The *English* Court unanimously held that federal occupation of the field of nuclear safety did not preempt a discharged employee's state law claim for intentional infliction of emotional distress. *English*, 496 U.S. at 80-86. In *English*, the Court decided that the effect of liability judgments on safety decisions by operators of nuclear facilities was "neither direct or substantial enough to place petitioner's claim in the pre-empted field." *Id.* at 85.

In addition, in its analysis, the *Silkwood* Court placed substantial emphasis on Congress' failure to provide a remedy for the injured in finding that Congress could not have intended to preempt a common law damage claim. *Silkwood*, 464 U.S. at 251. On the other hand, the "whistle blower" statute at issue in *English* did provided a federal remedy to discharged employees. *English*, 496 U.S. at 87-90. Nonetheless, the *English* Court rejected the defendant's argument that the federal remedy provision for whistle blowers implicitly preempted the state law claim. Instead, the *English* court adopted the rationale from *Silkwood* that common law damage claims survive the sweeping regulation of the nuclear safety field. *Id.*

In yet another modern preemption case, *Medtronic*, this Court reaffirmed and clarified its preemption analysis. The plaintiffs involved had sued the manufacturer of a defective pacemaker and the question before the Court was whether a federal statute with an express preemption provision (Medical Device Amendments of 1976 (21 U.S.C. §§ 360c, *et seq.*)

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find Congressional intent. The *Silkwood* Court did not engage in judicial policymaking as many lower courts, including the Ohio courts herein, have improperly done in blindly relying on *Napier*.

("MDA")) barred the plaintiffs' state tort claims. The Court examined the purpose and structure of the MDA in the context of the strong presumption against preemption. *Medtronic*, 518 U.S. at 485. Although the federal legislation expressly prohibited establishment of *any* state requirement different from that contained in the federal statute, the Court found no congressional intent that the term necessarily included all common law tort actions. *Id.* at 486-492. In reaching this conclusion, the Court emphasized that (1) Congress could not have intended to effectively bar all possible relief for injuries suffered by consumers as a result of defective medical devices given the legislation's purpose of safety; and (2) general state common law tort actions were not the kinds of requirements Congress feared would impede federal objectives. *Id.*

Medtronic and *Silkwood* both acknowledge the availability of tort damages where there is specific federal regulation of the instrumentality that caused the injury. These cases demonstrate that field preemption cannot bar all state common law claims. The field is "defined by reference to the state law in question." *English*, 496 U.S. at 85. Therefore, given a finding that certain federal legislation preempts the field, the parameters of that field are defined by assessing whether particular state action will conflict with the congressional objectives underlying the federal statute. *Id.* at 80. Again, the Court in *English* set forth the test for determining whether the preempted field includes the particular tort claim at issue: would a recovery for the plaintiff under the state claim conflict with or otherwise have a "direct and substantial effect" on the regulated matter? *Id.* 496 U.S. at 84-85. The BIA, similar to the statutes at issue in *Silkwood* and *Medtronic*, is concerned primarily with safety. It was enacted "to promote safety in every area of railroad operations and reduce

railroad accidents and incidents." 49 U.S.C.A. § 20701; *See, e.g., Urie*, 337 U.S. at 191. Preemption of the state common law claims herein will defeat this purpose.

Under the *English* test, and following the related rationale applied by this Court in *Silkwood* and *Medtronic*, the BIA does not preempt Petitioner's state law tort claims. As discussed, neither the text nor the legislative history of the BIA permits the conclusion that Congress intended to restrict employees and others from obtaining a common law remedy for injuries caused by a manufacturers' defective products. In fact, such a remedy did not even exist at the time the BIA was enacted.

Furthermore, the use of asbestos in locomotives has never been regulated. Federal preemption does not arise unless a defendant is subjected to inconsistent duties, "or where it is impossible to comply with both federal and state requirements * * *" *English*, 496 U.S. at 79. Here, as noted by the dissent herein, there is no irreconcilable conflict between federal and state standards because the federal government has never regulated the use of asbestos in locomotives and manufacturers have ceased using asbestos in locomotives since the mid 1980s. *See* Federal Railroad Administration, *Locomotive Crashworthiness and Cab Working Conditions* at 10-11, 10-12 (1996), reproduced at App. 43a-49a. Accordingly, the state law remedies at issue here pose no threat to federal objectives under the BIA.

Moreover, if preemption is allowed, employees, passengers and bystanders will not be entitled to a remedy against a manufacturer for injuries caused by any flaws in the design or manufacture of a locomotive, no matter how egregious. This is so even when, as here, the state damage actions do not conflict with any federal regulation or with the goals of the BIA. Such

absolute immunity for manufacturers is wholly inconsistent with the congressional intent underlying the BIA, which was enacted to increase safety for workers and passengers on railroads.

In fact, if the decision of the Supreme Court of Ohio is upheld in this case, the scope of the resulting immunity from tort claims will be endless. It will shield manufacturers of locomotives and locomotive equipment from any legal responsibility to victims for the injuries caused by their defective products. For instance, a defectively designed or manufactured locomotive explodes and injures scores of passengers and bystanders. Under the decision of the Supreme Court of Ohio, these injured passengers and bystanders would have no recourse for their injuries as any state common law claims will be preempted because they would occupy the infinite field of locomotive safety. Additionally, these individuals will have no recourse under the FELA since they are not employees of the railroad. The decision of the Supreme Court of Ohio, therefore, shields railroad equipment manufacturers from any liability to anyone injured by their defectively designed or manufactured locomotives.[11] This absurd cascading immunity is contrary to Congress' intent and could serve no federal purpose.

Further, allowing these state law claims for asbestos exposure will not have any impact on the national uniformity

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11. Although railroad workers injured in the explosion could bring a cause of action against their employer railroad under the FELA, the railroad, in such a situation, could conceivably not have even the slightest blame for the accident. For instance, the railroad could show that it did not know, nor reasonably could have been expected to know, of the defective design or manufacturing process and therefore should not be held responsible for the accident. If the railroad is found without fault, then the injured railroad workers would be in the same situation as the passengers and bystanders–injured by the manufacturer's malfeasance and precluded from seeking recourse.

of federal regulations concerning railroad safety. *Napier* and its progeny rested much of their analyses on the disastrous consequences that could result if every state implemented varying safety standards. Such varying state safety standards would create the inefficient result of forcing railroads to either stop at every state border to change equipment to come into compliance with that state's laws or to conform to the standards of the strictest state and thereby effectively render the BIA useless. But such a fear is irrational herein. The BIA, FELA or any other federal regulation has never regulated asbestos use in locomotives. In fact, because of its well-known dangers, asbestos insulation is no longer used in the manufacture of locomotives.

In addition, the United States Supreme Court in *Sprietsma* found that although the act at issue therein was concerned with uniformity in manufacturing regulations, such an interest was not unyielding. In fact, the *Sprietsma* Court declined to find implied field preemption stating that "the concern with uniformity does not justify the displacement of state common-law remedies that compensate accident victims and their families and that serve the [Federal Boat Safety] Act's more prominent objective, emphasized by its title, of promoting boat safety." *Sprietsma*, 537 U.S. at 70. Likewise, the BIA's prominent objective is promoting railroad safety and its concern for uniformity is not unyielding. In any event, allowing state common law tort claims for asbestos exposure will not have any impact on the uniformity of the BIA since asbestos is no longer used in locomotives. Allowing the BIA to preempt the state law claims herein will unfairly impair the ability of former railroad employees and their families to seek an adequate remedy for their asbestos- related injuries. Nothing in the BIA, FELA, *Napier* or any other decision clearly and manifestly indicates Congress' intent to preclude such claims.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be accepted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF OHIO, CUYAHOGA COUNTY, EIGHTH DISTRICT DECIDED JULY 28, 2004

SUPREME COURT OF OHIO

No. 2003-0300

Submitted December 3, 2003

Decided July 28, 2004

DARBY,

Appellant,

v.

A-BEST PRODUCTS COMPANY ET AL.;
Viad Corporation ET AL.,

Appellees.

APPEAL from the Court of Appeals for Cuyahoga County,
No. 81270, 2002-Ohio-7070.

MOYER, C.J.

Forest L. Darby, appellant, along with multiple other plaintiffs, filed a complaint in the Cuyahoga County Court of Common Pleas against nearly 60 named defendants and against additional defendants identified only as "John Does 1-100, Manufacturers, Sellers or Installers of Asbestos-Containing Products." Although the claims of the plaintiffs were filed in a single "master consolidated complaint," each

plaintiff's action proceeded under a separate case number. Darby and the other plaintiffs alleged that they had been exposed to asbestos during their employment in Ohio, causing them to contract asbestosrelated diseases. They asserted that the defendants had produced, sold, or otherwise put into the stream of interstate commerce asbestos and asbestos-containing materials. The plaintiffs sought punitive damages and damages based on multiple state-law theories of recovery.[1]

Nearly two years after the filing of the complaint, Darby and numerous other plaintiffs (collectively, "Darby") moved to amend the complaint pursuant to Civ.R. 15(A)[2] and 20(A)[3]

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1. Darby alleged that the defendants (1) breached their implied warranty of good and merchantable quality and fitness for the particular intended use, (2) manufactured and sold defective and unreasonably dangerous products, and (3) did not give adequate warning about the products' dangers. Darby further asserted a claim of enterprise liability, alleging that the defendants represent a substantial share of the asbestos-containing product market, and claiming that the defendants are severally liable to the plaintiffs based upon their pro rata market share within the market.

2. Civ.R. 15(A) provides, "A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within twenty-eight days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party. Leave of court shall be freely given when justice so requires."

3. Civ.R. 20(A) provides, "All persons may be joined in one action as defendants if there is asserted against them jointly, severally,

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to add 11 new party-defendants, among them Viad Corporation, Vapor Corporation, and Baldwin-Lima-Hamilton, Inc. ("BLH"). Viad, BLH's alleged successor-in-interest, filed a memorandum in opposition to the motion. Vapor did not appear. No previously named defendant opposed the motion.

The trial court held an oral hearing on Darby's motion to amend and add party-defendants and permitted counsel for Viad to participate. Counsel for both Darby and Viad agreed that Darby was representative of approximately 2,000 plaintiffs in similar suits pending in the trial court. Darby's counsel further asserted, without producing evidence, that these plaintiffs had been railroad employees, the vast majority working in railroad repair shops and in locomotives, cars, and cabooses of trains that contained asbestos. Counsel for Viad represented, again without proof, that BLH was a "long defunct corporation" that had manufactured locomotives until the mid-1950s, and that Viad is the alleged successor-in-interest to BLH. It argued that the Federal Locomotive Boiler Inspection Act, Section 20701 et seq., Title 49, U.S.Code ("BIA"), preempted the plaintiffs' state-law tort claims against it and that Darby's motion to add Viad as a defendant should therefore be denied because "there is no possibility, statutory or common law, that plaintiffs could allege a valid cause of action, a cause of action that could withstand attack as a matter of law against these defendants."

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or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or succession or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action."

Appendix A

The trial court overruled Darby's motion for leave to add Viad, Vapor, and BLH as new party-defendants without opinion but granted leave to add the remaining entities named in Darby's motion. In its order, the court expressly determined that there was no just reason for delay.

Darby appealed, presenting a single assignment of error in the court of appeals. He claimed that the trial court had erred in denying his motion to amend and add new party-defendants "because the Locomotive Boiler Inspection Act, Title 49 of the United States Code, Section 20701 et seq., does not pre-empt plaintiff's state law claims."

Subsequently another company, Old Orchard Industrial Corporation, appeared for the first time when it filed a brief purportedly as a defendant-appellee. It described itself as the successor-in-interest to Vapor Corporation and argued that the court of appeals should affirm the trial court's order refusing to allow the addition of the three new party-defendants.

The court of appeals affirmed the trial court's denial of leave to amend the complaint to add the three new parties. It concluded that Darby's state-law claims against Viad, BLH, and Old Orchard (purportedly the successor to Vapor) were barred because "the BIA completely preempted state law on requirements imposed upon locomotive parts, or materials used in such parts."

This cause is now before this court upon the acceptance of a discretionary appeal. We are called upon to resolve a single issue — did the court of appeals err in affirming the

interlocutory decision of the trial court refusing to allow the addition of Viad, BLH, and Vapor as new party-defendants? We hold that the court of appeals did not err.

I

Procedural Considerations

Before considering the parties' arguments concerning the federal preemption doctrine, we review the procedural posture of this case to determine whether that substantive legal issue is properly before us.

Darby grounded his motion to add new party-defendants on Civ.R. 15 and 20[4] even though Civ.R. 21 expressly governs initial nonjoinder and subsequent addition of parties. It provides: "Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just." Civ.R. 21 requires a plaintiff to receive leave of court, while Civ.R. 15(A) requires such leave once a responsive pleading has been served.

In federal practice, plaintiffs have, however, successfully invoked Fed.R.Civ.P. 15 not only to add new claims against existing parties, but also, as here, to add completely new parties. 2 Moore, Vestal & Kurland, Moore's Manual: Federal Practice and Procedure (2001) 14-52, Section 14.41[2].

4. Counsel for Darby did, however, represent at the oral hearing held on his motion that he sought to amend the complaint to add new parties "based on the Civil Rules, Rule 15 *and 21*, in addition to Rule 20." (Emphasis added.)

Appendix A

Federal courts have recognized that a trial court has broad discretion to grant leave to add or dismiss parties whether proceeding under either Fed.R.Civ.P. 15 or 21. In either case, the court's decision should be guided by principles of fundamental fairness and judicial efficiency as well as by related considerations of timeliness and prejudice. Moore, id. at 14-46, Section 14.26[1][b] (in ruling upon a motion for joinder by amendment of the complaint pursuant to Fed.R.Civ.P. 15, "the court will deny joinder that might have been proper in the original complaint if the plaintiff has delayed excessively in making a motion for the new joinder, or if the joinder would prejudice the interests of an existing party"); id. at 14-52.1, Section 14.42 (Fed.R.Civ.P. 21 "has been held to provide the trial court with considerable discretion in determining whether to add or dismiss parties, or to order severance. While each case must be addressed on its particular facts and circumstances, the court in exercising its discretion must consider principles of fundamental fairness and judicial efficiency"). See, also, *Health Research Group v. Kennedy* (D.D.C.1979), 82 F.R.D. 21, 29.

Similarly, Ohio courts of appeals have recognized that the decision to add or drop a party pursuant to Civ.R. 21 is within the discretion of the trial court. *Bill Gates Custom Towing, Inc. v. Branch Motor Express Co.* (1981), 1 Ohio App.3d 149, 150, 1 OBR 460, 440 N.E.2d 61; *Picciuto v. Lucas Cty. Bd. of Commrs.* (1990), 69 Ohio App.3d 789, 797, 591 N.E.2d 1287. We today hold that review of a trial court decision on a motion seeking leave to add new parties, whether filed pursuant to Civ.R. 15 or 21, is subject to an abuse-of-discretion standard of review.

"Abuse of discretion" connotes more than a mere error of law or judgment, instead requiring a finding that the trial court's decision was unreasonable, arbitrary, or unconscionable. *In re Consol. Mtge. Satisfaction Cases*, 97 Ohio St.3d 465, 2002-Ohio-6720, 780 N.E.2d 556, ¶ 5, citing *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 OBR 481, 450 N.E.2d 1140. Accordingly, the decision of the trial court denying leave to add Viad, BLH, and Vapor as party-defendants may be reversed only if Darby can demonstrate that the trial court's decision was unreasonable, arbitrary, or unconscionable.

Darby argues that the proposed new party-defendants' assertion of a federal preemption bar to recovery is legally unfounded. He seeks reversal of the trial court's decision based solely on his disagreement with the proposed defendants' substantive legal assertion that they have an unassailable defense to the claims Darby proposes to make against them.

In *Wilmington Steel Products, Inc. v. Cleveland Elec. Illum. Co.* (1991), 60 Ohio St.3d 120, 573 N.E.2d 622, we held that a trial court does not abuse its discretion by refusing to allow amendment of a complaint to add new *claims* against *existing* parties where a plaintiff is unable to make a prima facie showing of support for the new matters sought to be pleaded. Id. at syllabus. In interpreting the federal counterpart to Civ.R. 21, however, it has been held that a court should not consider the merits of the claim or defense of the person to be added in deciding a motion to join parties. 7 Wright, Miller & Kane, Federal Practice and Procedure (2001) 483, Section 1683, citing, e.g., *Stanley Works v. Haeger Potteries,*

Inc. (D.C.Ill.1964), 35 F.R.D. 551. We have not previously considered this issue. Nevertheless, both federal and Ohio courts have denied joinder of new parties if the applicable statute of limitations has expired with respect to the parties to be joined. *Copsey v. Swearingen* (C.A.5, 1994), 36 F.3d 1336, 1348; *Picciuto v. Lucas Cty. Bd. of Commrs.*, 69 Ohio App.3d at 797-800, 591 N.E.2d 1287.

We acknowledge that a trial court has discretion in ruling upon a motion for leave to add new parties. We believe, however, that, in most cases, the merit of substantive legal defenses that may be asserted by potential parties, as opposed to existing parties, are better resolved after a decision to grant leave to add new parties has been made independently. Unless it is apparent on the face of the pleadings that all claims against the proposed defendant are wholly futile, the better practice is for the trial court to rule on a motion to add parties based on traditional grounds, including timeliness and prejudice to existing parties, independent of the merits of substantive legal defenses that a proposed defendant may have. If leave is granted, properly served new defendants will then have the opportunity to appear and assert their substantive defenses through established procedures, i.e., an answer filed pursuant to Civ.R. 12(A) or a motion to dismiss pursuant to Civ.R. 12(B). Cf. *Wolfson v. Lewis* (E.D.Pa.1996), 168 F.R.D. 530; *Expoconsul Internatl., Inc. v. A/E Sys., Inc.* (S.D.N.Y.1993), 145 F.R.D. 336.

Had such a procedure been followed in this case, and assuming that the trial court had granted Darby's motion to add Viad, BLH, and Vapor, those new defendants would have been in the same position as if they had been joined initially.

Assuming proper service of summons and the complaint, they would have had full opportunity to file a responsive pleading in the form of either an answer or a motion seeking dismissal of the complaint pursuant to Civ.R. 12. Had they chosen to file a Civ.R. 12(B)(6) motion, the trial court could have accepted evidence and considered the motion under the summary-judgment standards of Civ.R. 56, thereby allowing the development of a factual record. See *Petrey v. Simon* (1983), 4 Ohio St.3d 154, 4 OBR 396, 447 N.E.2d 1285.

Instead, in the instant cause we have a record of "facts" that were never formally pleaded and are supported solely by the representations of counsel. We have litigants (one of whom appeared first in the court of appeals and two of whom appear to be defunct corporate entities) purporting to be appellees although they have never been properly served or recognized as parties in the cause before us.

Darby argues that the trial court in effect treated the appellees' memorandum in opposition to his motion to add new parties as a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim. In so doing, Darby implies that a nonparty to an action has standing to file such a motion. We are aware of no authority or precedent for such a premise. Moreover, such an approach inappropriately encourages trial courts to bypass the traditional criteria by which a motion to add parties should be judged.

In considering a plaintiff's request for leave to amend, "a trial court's 'primary consideration is whether there is actual prejudice to the defendants because of the delay.'" *Helman v. EPL Prolong, Inc.* (2000), 139 Ohio App.3d 231,

251, 743 N.E.2d 484, citing *Schweizer v. Riverside Methodist Hosp.* (1996), 108 Ohio App.3d 539, 546, 671 N.E.2d 312. Although we have held in a case involving the assertion of a new claim against an existing defendant that the plaintiff must make "'at least a prima facie showing [of] support for the new matters sought to be pleaded,'" that consideration is meant to aid in determining whether the amendment is "'simply a delaying tactic, [or] one which would cause prejudice to the defendant.'" *Wilmington Steel Products*, 60 Ohio St.3d at 122, 573 N.E.2d 622, quoting *Solowitch v. Bennett* (1982), 8 Ohio App.3d 115, 117, 8 OBR 169, 456 N.E.2d 562. Indeed one federal court has refused to allow a proposed new party, yet unserved, to appear at all, even as an amicus, in opposition to a motion to add it as a party-defendant in an existing action. *Paradigm Ins. Co. v. Walters Diving & Marine, Inc.* (E.D.La.1999), No. 98-1617, 1999 WL 232669. See, also, *In re Everfresh Beverages, Inc.* (1999), 238 B.R. 558, 569, fn. 8 (observing in ruling on a motion to add additional defendants pursuant to Fed.R.Civ.P. 15(a) that "[t]he Proposed Additional Defendants' rights, including objecting to the Plaintiffs' complaint on the ground of timeliness" were not before the court).

In arguing only the legal merits of the proposed defendants' substantive federal preemption defense, Darby implies that, if he is correct that federal preemption does not bar his state-law claims, the trial court had no choice, in the exercise of a sound discretion, but to grant him leave to add these parties. The flaw in that implication is that the trial court might well have agreed with Darby that the preemption defense had no merit, but nevertheless denied leave based on traditional rationales for refusing to add new parties, e.g.,

untimeliness, prejudice to existing parties, or bad faith on the part of the movant. As in any appeal challenging the exercise of trial court discretion, it is the burden of the party asserting abuse of discretion, here Darby, to affirmatively identify it. Thus, assuming, arguendo, that Darby is legally correct on the merits of the federal preemption issue, we could nevertheless dismiss this appeal based on Darby's failure to identify a reversible abuse of discretion by the trial court.

Nevertheless, in the case at bar, no existing defendant objected to Darby's request to add parties. The proposed new defendants who did appear, with the permission of the court, in opposition to the motion objected to their addition as parties based solely on the federal preemption doctrine. In addition, the trial court allowed the addition of eight other proposed defendants who did *not* assert a federal preemption defense, and all of the litigants at this stage have affirmatively represented to us that the trial court had no justification for refusing to add the new parties as defendants other than the applicability of a valid federal preemption defense.

On this record we see no justification for the trial court's decision to discriminate between the other entities enumerated in Darby's motion, which it added as parties, and Viad, BLH, and Vapor, which it did not, other than the conclusion that Darby could not overcome a federal preemption defense asserted by those three entities. In view of this circumstance, we will proceed to resolve the substantive legal issue presented to us. In doing so, we assume the unchallenged representations of fact made by counsel to be true. That is, we accept as fact that Darby and the other plaintiffs joining in his motion were exposed to asbestos

either within railroad equipment manufactured by the proposed party-defendants or while working on that equipment in repair and maintenance facilities. We further accept as true that Viad, BLH, and Vapor were manufacturers or suppliers of locomotive products containing asbestos to which Darby was exposed.

II

Federal Preemption

The substantive legal issue presented is whether Darby's state-law tort claims are preempted by the BIA. We agree with the court of appeals that Darby's claims are preempted by this federal law.

The Supremacy Clause of the United States Constitution provides that "the Laws of the United States * * * shall be the supreme Law of the Land; * * * any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Clause 2, Article VI, United States Constitution. Consistent with precedent established by the Supreme Court of the United States, this court has long recognized that the Supremacy Clause allows Congress to deprive the states of power to regulate in a field of commerce that Congress intended to occupy exclusively, a principle commonly designated the federal preemption doctrine. See *Jones Metal Products Co. v. Walker* (1972), 29 Ohio St.2d 173, 176-177, 58 O.O.2d 393, 281 N.E.2d 1, citing *Florida Lime & Avocado Growers, Inc. v. Paul* (1963), 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248.

Appendix A

In the past, we have resolved numerous cases in which it was argued that the federal preemption doctrine invalidated state regulations, including cases in which it was argued that the doctrine precluded courts from providing state common-law tort remedies to plaintiffs.[5] In some cases, we have determined that federal law invalidates Ohio law. See, e.g., *J.A. Croson Co. v. J.A. Guy, Inc.* (1998), 81 Ohio St.3d 346, 691 N.E.2d 655 (unanimously finding that an Ohio prevailing wage statute and regulation were preempted by the National Labor Relations Act, Section 151 et seq., Title 29 U.S.Code, to the extent that they interfered with federal job-targeting programs). In other cases we have found that the federal preemption doctrine does not invalidate Ohio law. See, e.g., *Pinchot v. Charter One Bank, F.S.B.*, 99 Ohio St.3d 390, 2003-Ohio-4122, 792 N.E.2d 1105 (unanimously finding that federal regulations enacted to implement the Home Owners' Loan Act, Section 1461 et seq., Title 12, U.S.Code, did not preempt a state law providing a $250 civil damage award for failure to record satisfaction of a residential mortgage within 90 days of payment).

It is unnecessary to survey the law of federal preemption in depth, as we have done so previously. See, e.g., *Minton v.*

5. See, e.g., *Statler v. Internatl. Bhd. of Elec. Workers Loc. Union No. 71* (1977), 51 Ohio St.2d 36, 5 O.O.3d 20, 364 N.E.2d 874; *Ohio Dept. of Energy v. Columbia Gas Transm. Corp.* (1979), 60 Ohio St.2d 21, 14 O.O.3d 167, 396 N.E.2d 748; *In re Miamisburg Train Derailment Litigation* (1994), 68 Ohio St.3d 255, 626 N.E.2d 85; *Minton v. Honda of Am. Mfg, Inc.* (1997), 80 Ohio St.3d 62, 684 N.E.2d 648, abrogated in part by *Geier v. Am. Honda Motor Co., Inc.* (2000), 529 U.S. 861, 120 S.Ct. 1913, 146 L.Ed.2d 914; *Pinchot v. Charter One Bank, F.S.B.* (2003), 99 Ohio St.3d 390, 792 N.E.2d 1105.

Honda of Am. Mfg., Inc. (1997), 80 Ohio St.3d 62, 684 N.E.2d 648. Instead, we reiterate the controlling principles that govern this case: (1) the critical question is whether Congress intended state law to be superseded by federal law — the historic police powers of the states are not to be superseded by federal law unless that is the clear and manifest purpose of Congress, (2) a presumption exists against preemption of state police-power regulations, and (3) federal law preempts state law where Congress has occupied the entire field, i.e., where a federal scheme of regulation is "'sufficiently comprehensive to make reasonable the inference that Congress "left no room" for'" a claim under state law. Id. at 69-70 and 76, 684 N.E.2d 648, quoting *California Fed. S. & L. Assn. v. Guerra* (1987), 479 U.S. 272, 281, 107 S.Ct. 683, 93 L.Ed.2d 613.

The BIA provides as follows:

"A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances

"(1) are in proper condition and safe to operate without unnecessary danger of personal injury." Section 20701, Title 49, U.S.Code.

Napier v. Atlantic Coast Line RR. Co. (1926), 272 U.S. 605, 47 S.Ct. 207, 71 L.Ed. 432, is the seminal case in the area of federal preemption based on the BIA. The court there recognized that Congress indeed had manifested the intention to "occupy the entire field of regulating locomotive equipment" by delegating authority to a federal regulatory

body extending "to the design, the construction, *and the material* of every part of the locomotive and tender and of all appurtenances." (Emphasis added.) Id. at 611, 47 S.Ct. 207, 71 L.E. 432. See, also, *Law v. Gen. Motors Corp.* (C.A.9, 1997), 114 F.3d 908, 910, quoting *S. Pacific Transp. Co. v. Oregon Pub. Util. Comm.* (C.A.9, 1993), 9 F.3d 807, 811 ("This broad preemptive sweep is necessary to maintain uniformity of railroad operating standards across state lines" so that "'locomotive companies need only concern themselves with one set of equipment regulations'").

In considering whether Darby's state-law tort claims are preempted by the BIA, the court of appeals noted that "case law is overwhelmingly supportive of an interpretation that the BIA completely preempted state law on requirements imposed upon locomotive parts, or materials used in such parts." This view is supported by the highest court of the state of West Virginia, which observed that "an overwhelming body of case law" exists supporting the conclusion that "through passage of the Boiler Inspection Act, Congress has occupied the field of railroad safety so pervasively" as to justify a finding of preemption of that field. *In re W. Virginia Asbestos Litigation* (2003), 215 W.Va. 39, 592 S.E.2d 818, 822. Indeed, it found "any other path blocked by an avalanche of adverse authority from other jurisdictions, both state and federal." Id.

The West Virginia court enumerated ten cases from multiple jurisdictions finding that the BIA preempts state common-law actions against both locomotive operators and locomotive manufacturers. Id., 215 W.Va. 39, 592 S.E.2d at 823-824. Three of those cases involved claims nearly

identical to those made by Darby against manufacturers of locomotives containing asbestos materials. *Gen. Motors Corp. v. Kilgore* (Ala.2002), 853 So.2d 171; *Scheiding v. Gen. Motors Corp.* (2000), 22 Cal.4th 471, 93 Cal.Rptr.2d 342, 993 P.2d 996; *Seaman v. A.P. Green Indus., Inc.* (2000), 184 Misc.2d 603, 606, 707 N.Y.S.2d 299 (noting that "with the exception of the *Viad* [*Corp. v. Los Angeles Cty. Superior Court,* (1997), 55 Cal.App.4th 330, 64 Cal.Rptr.2d 136] court, every federal and state appellate court that has considered the issue has found that the BIA entirely preempts the field of locomotive safety and bars state tort claims").

It is not legally significant that Darby's claims are directed against the manufacturers of locomotives as opposed to railroad companies themselves. "Imposing tort liability on railroad equipment manufacturers would * * * forc[e] them to conform to design and construction standards imposed by the states. This would transfer the regulatory locus from the Secretary of Transportation to the state courts — a result the BIA was clearly intended to foreclose." *Law*, 114 F.3d at 911-912.

The Ninth Circuit concluded in *Law*: "Through the BIA, the federal government has established a comprehensive, national regime of locomotive regulation. This regime — enforced by [the Federal Employers' Liability Act, Section 51 et seq., Title 45, U.S.Code] and the threat of heavy civil penalties — preempts every state effort to establish independent standards for the design, construction and material of locomotives." (Footnote omitted.) Id. at 913.

We agree, and similarly hold that Darby's claims against locomotive manufacturers are wholly futile. The Federal Locomotive Boiler Inspection Act, Section 20701 et seq., Title 49, U.S.Code, preempts state-law tort claims against the manufacturers of railroad locomotives asserting injury caused by exposure to asbestos contained in railroad locomotives.

Accordingly, the trial court did not abuse its discretion in refusing to allow the addition of Viad, Vapor, and BLH as new party-defendants. We therefore affirm the judgment of the court of appeals.

Judgment affirmed.

F.E. SWEENEY, LUNDBERG STRATTON, O'CONNOR and YOUNG, JJ., concur.

RESNICK, J., dissents.

PFEIFER, J., dissents.

FREDERICK N. YOUNG, J., of the Second Appellate District, sitting for O'DONNELL, J.

Appendix A

PFEIFER, J., dissenting.

Napier v. Atlantic Coast Line RR. Co. (1926), 272 U.S. 605, 47 S.Ct. 207, 71 L.Ed. 432, concerned Georgia and Wisconsin statutes that required, respectively, firebox doors and cab curtains in locomotives. As such, those statutes were directly at odds with the authority Congress delegated to federal agencies under the Locomotive Boiler Inspection Act, Section 20701 et seq., Title 49, U.S.Code, over the design, construction, and material of every part of the locomotive and tender and all appurtenances. Had the court allowed states to impose their own safety regulations as to locomotives, travel on the nation's railways might have been disrupted due to differing regulations. Clearly, the Congress enacted the BIA to achieve uniformity, and it drew upon its powers enumerated in the Commerce Clause to do so.

This case is not *Napier.* Here, we are not dealing with legislative regulation of specific equipment. We are dealing with tort liability for injuries allegedly caused by a product that is no longer in use. The effect on interstate commerce is nil. The "runaway train" theory of the effects of state regulation — "If each state were to adopt different liability-triggering standards, manufacturers would have to sell locomotives and cars whose equipment could be changed as they crossed state lines, or adhere to the standard set by the most stringent state," *Law v. Gen. Motors Corp.* (C.A.9, 1997), 114 F.3d 908, 910-911 — is not at issue. The industry itself has moved away from asbestos. The Federal Railroad Administration reported in a 1996 report that "friable asbestos has not been used as a material in the construction of locomotives for ten years or more." The FRA further reported:

Appendix A

"Locomotive builders are careful to avoid the use of asbestos in new and rebuilt locomotives. Asbestos remaining in older units is believed to be encapsulated in individual components or systems. FRA could find no evidence of asbestos being a health problem for crews of older locomotives." FRA, Report to Congress, Locomotive Crashworthiness and Cab Working Conditions (Sept. 1996), at 12-9.

Since plaintiffs' tort action for injuries allegedly caused by asbestos exposure would have no effect on the design, construction, or material of locomotives now in use, there is no danger of state common law intruding into the federal domain. The preemption doctrine exists to protect the federal government's niche, not to protect a certain industry from the common law of states.

APPENDIX B — OHIO SUPREME COURT'S SUA SPONTE REQUEST FOR ADDITIONAL BRIEFING DATED FEBRUARY 2, 2004

SUPREME COURT OF OHIO

NO. 2003-0300

February 05, 2004

Darby

v.

A-Best Products Co.

MOTION AND PROCEDURAL RULINGS

This cause is pending before the court as an appeal from the Court of Appeals for Cuyahoga County. Whereas the court finds that supplemental briefing is necessary,

IT IS ORDERED by the court, sua sponte, that the parties brief the following issues:

1. What criteria should a trial court consider in deciding a motion to add additional parties filed pursuant to either *Civ.R. 15* or *Civ.R. 21*? Specifically, should an Ohio trial court consider the merits of a substantive defense in determining a motion to add additional parties? Or should resolution of the merits of a substantive defense be deferred for consideration of a subsequent *Civ.R. 12(B)(6)* or other motion?

2. What standard of review should an appellate court employ in reviewing the denial of a motion to add party-defendants?

3. Assuming, arguendo, that the doctrine of federal preemption bars plaintiff-appellant's claims in the case at bar, is the denial of plaintiff-appellant's motion to add party-defendants otherwise supportable?

IT IS FURTHER ORDERED by the court that appellant's supplemental brief shall be filed within 20 days of the date of this entry; appellees' supplemental briefs shall be filed within 10 days of the filing of appellant's supplemental brief; and appellant may file a reply brief within 5 days of the filing of appellees' supplemental briefs.

IT IS FURTHER ORDERED that no extensions of time shall be permitted for the filing of supplemental briefs, and the parties shall otherwise comply with S.Ct.Prac.R. VI.

Frederick N. Young, J., of the Second Appellate District, sitting for O'Donnell, J.

APPENDIX C — OPINION OF THE COURT OF APPEALS OF OHIO, CUYAHOGA COUNTY, EIGHTH DISTRICT DECIDED DECEMBER 19, 2002

COURT OF APPEALS OF OHIO
EIGHTH DISTRICT
CUYAHOGA COUNTY

Forest L. DARBY,

Plaintiff-Appellant,

v.

A-BEST PRODUCTS COMPANY, et al,

Defendants-Appellees.

No. 81270

Decided December 19, 2002

ANNE L. KILBANE, Judge.

This is an appeal by appellant Forest L. Darby and several co-plaintiffs/appellants (collectively, "the Darby Group") from an order of Visiting Judge Harry Hanna that denied their motion to amend their complaint for asbestos-related personal injury claims. The Darby Group claims it was error to find the Federal Locomotive Boiler Inspection Act ("BIA") preempted their right to amend their complaint to name appellees Viad Corporation, the alleged successor-in-interest to locomotive manufacturer Baldwin-Lima-Hamilton, Inc., ("Viad"), and Old Orchard Industrial Corp., individually and

as successor-in-interest to Vapor Corporation, ("Vapor") an alleged manufacturer of asbestos-containing locomotive parts, as defendants. We affirm.

The Darby Group are former railroad company employees asserting claims that, through their employment, they were exposed to asbestos-containing products and contracted occupational diseases as a result. They moved to add Viad as the sixty-first and sixty-second defendants on the theory that, respectively, as manufacturers of locomotives or of asbestos-containing component parts of railroad locomotives, such as brakes, insulated wire, gaskets, and others, Viad and Vapor were potentially liable for injuries sustained by them. While separate intities, for the sake of efficiency, Viad and Vapor will hereinafter be jointly referenced simply as "Viad."

The Darby Group asserted that while some of them were exposed to asbestos in the course of on-line railroad operations, others were exposed while engaged as repair personnel for engines at maintenance facilities. Following briefs and a hearing, the motion was denied with a *Civ.R. 54(B)* "no just reason for delay" notation, allowing this interlocutory appeal to proceed. On appeal, as below, the Darby Group contends that it should have been permitted to amend its complaint for six main reasons: (1) the judge failed to adhere to the legal maxim that preemption of state law is strongly disfavored; (2)that the BIA only applies to injury claims sustained from locomotives "in use" and not those in repair facilities; (3) that railroad repair shops are specifically governed by the Occupational Health and Safety Administration Act, which preserves state law claims;

(4) that the BIA, under the facts of this case, only applies to railroad employers and not manufacturers of locomotive parts; (5) that Congress, in enacting the original BIA in 1911, could not have envisioned barring the tort claims The Darby Group wish to assert, which did not then exist and; (6) that recent Supreme Court case precedent urges against preemption under the facts of this case.

"'Article VI of the Constitution provides that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." * * * Thus, since [the United States Supreme Court's] decision in *McCulloch v. Maryland,* * * * it has been settled that state law that conflicts with federal law is 'without effect. * * * Consideration of issues arising under the Supremacy Clause "starts with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." ' Accordingly, "the purpose of Congress is the ultimate touchstone" of preemption analysis. * * *.

Congress' intent may be 'explicitly stated in the statute's language or implicitly contained in its structure and purpose.' * * * In the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law, * * * or if federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it.'"[1]

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1. *Cippollone v. Liggett Group, Inc.* (1992), 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407 (internal citations omitted).

Appendix C

According to the plain language of *49 U.S.C. 20701*, "A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and *its parts and appurtenances*—

> "(1) are in proper condition and safe to operate without unnecessary danger of personal injury;
>
> "(2) have been inspected as required under this chapter [*49 USCS §§ 20701* et seq.] and regulations prescribed by the Secretary of Transportation under this chapter [*49 USCS §§ 20701* et seq.]; and
>
> "(3) can withstand every test prescribed by the Secretary under this chapter [*49 USCS §§ 20701* et seq.], (emphasis added)."

The United States Supreme Court has held that, in enacting the BIA, the manifest intent of Congress was to pre-empt the field of regulation concerning " * * * the design, the construction and the material of every part of the locomotive and tender and of all appurtenances."[2] This principle has been upheld by all federal circuit courts to visit the issue, as well as the Tenth District Court of Appeals Of Ohio.[3] "This broad preemptive sweep is necessary to maintain

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2. *Napier v. Atlantic Coast Line R.R. Co.* (1926), 272 U.S. 605, 611, 47 S.Ct. 207, 71 L.Ed. 432.

3. *E.g., Springston v. Consolidated Rail Corp.* (6th Cir., 1997), 130 F.3d 241, 245, *Law v. General Motors Corp.* (9th Cir., 1997), 114 F.3d 908, 910, *Ogelsby v. Delaware Delaware & Hudson Ry.* (2nd Cir., 1999), 180 F.3d 458, 460; *see also, Carter v. Consolidated Rail Corp.* (1998), 126 Ohio App.3d 177, 709 N.E.2d 1235.

uniformity of railroad operating standards across state lines. Locomotives are designed to travel long distances, with most railroad routes wending through interstate commerce. The virtue of uniform national regulation 'is self evident: locomotive companies need only concern themselves with one set of equipment regulations and need not be prepared to remove or add equipment as they travel from state to state. * * * (citations omitted).'"[4]

The Darby Group's argument to the contrary notwithstanding, it was appropriate to disregard any presumption against preemption in denying the motion to amend the complaint; case law is overwhelmingly supportive of an interpretation that the BIA completely preempted state law on requirements imposed upon locomotive parts, or materials used in such parts.

Next, The Darby Group contends that locomotives technically not "in use" at the time they cause injury are not covered by the BIA and, therefore, the act may not preclude state tort actions against the manufacturer of a potentially hazardous part or material in a locomotive repair facility. {¶ 13} The Darby Group supports this proposition with cases brought under the Federal Employer Liability Act, 45 U.S. 51 ("FELA"), the mechanism under which railroad workers may seek redress from their employers for injuries occurring at work. If the injury was the result of a BIA violation, the employer is strictly liable for its worker's damages and cannot assert a comparative negligence defense.[5] If the injury is not

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4. *Law v. General Motors Corp.* (1997), 114 F.3d 908, 910.

5. *E.g. Urie v. Thompson* (1949), 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282, *Crockett v. Long Island R.R.* (2nd Cir., 1995), 65

(Cont'd)

the result of a BIA violation, the worker must prove negligence on the part of the employer and any comparative negligence on his part reduces any damages he may be awarded.[6] It is in that context that the BIA may apply or not apply.

These FELA cases do not undermine the preclusive application of the BIA, they refer to the advantage given an injured worker over the employer when the injury resulted from a BIA violation, as opposed to non-BIA related incidents where it is necessary to establish the employer's negligence as the proximate cause of the injury and examine the worker's lack of due care. Whether the BIA "applies" in FELA claims, therefore, has no bearing in a preemption analysis directed to the locomotive part or materials manufacturers at issue here. Whether a locomotive is off-line in a repair shop or moving interstate, the BIA preempts state tort law, and the FELA replaces it in the railroad workplace environment.

It is The Darby Group's contention that, since the Federal Railroad Safety Administration, under the Federal Secretary of Transportation, has acquiesced, in part, to Occupational Safety and Health Administration monitoring and enforcing of general repair facility workplace safety, common law state tort actions for any repair shop injury occurring are not preempted by the BIA.

(Cont'd)

F.3d 274, *Holfester v. Long Island R.R.* (2d Cir.1966), 360 F.2d 369, 371; *see also Topping v. CSX Transportation, Inc.*, (4th Cir.1993), 1 F.3d 260, 261.

6. 45 U.S.C. 51.

Appendix C

In *Southern Railway Co. v. Occupational Safety and Health Review Comm.*,[7] OSHA inspected and cited a railyard for ten workplace safety infractions. In rejecting the railroad's defense of BIA preemption, the court noted that BIA had not established very many general safety regulations applicable to an employer's railyard as opposed to other federal safety regulations specific to the employer as a common carrier:

"OSHA was enacted in response to an appalling record of death and disability in our industrial environment, and it was the clear intendment of Congress to meet the problem with broad and, hopefully, effective legislation. The declared purpose of the Act was 'to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources.' *29 U.S.C. § 651(b)*. 'Since the statute does not, on its face, provide an answer to the specific question [before us] * * * reference to the statutory purpose behind the Act is especially necessary to arrive at an interpretation of the statute consistent with the objectives Congress sought to achieve through this legislation.' * * * Additionally, the scope of the Congressional objective requires that this 'remedial social legislation * * * be construed liberally in favor of the workers whom it was designed to protect, and any exemption from its terms must be narrowly construed.' * * * Accordingly, the exemptive statute should appropriately be construed to achieve the maximum protection for the industrial workers of the Nation.

"In our opinion the industry-wide exemption urged upon us by Southern would fly in the face of these principles and

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7. (4th Cir., 1976), 539 F.2d 335.

objectives. The safety regulations of the Department of Transportation are confined almost exclusively to those areas of the railway industry which affect over-the-road operations such as locomotives, rolling stock, signal installations, road beds and related facilities. * * * While the regulatory program in these areas reflects a concern for the safety of the employees, it is directed primarily toward the general safety of transportation operations. On the other hand, the Department of Transportation and FRA do not purport to regulate the occupational health and safety aspects of railroad offices or shop and repair facilities. To read the exemptive statute in a manner which would leave thousands of workers in these non-operational areas of the railway industry exposed to unregulated industrial hazards would, in our opinion, utterly frustrate the legislative purpose."[8]

Under OSHA, at *29 U.S.C. 653(4)(b)(4)*:

"Nothing *in this Act* shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under *any law* with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment. (emphasis added.)"

This statute, however, by its explicit language, only limits OSHA's own ability to restrict remedies for workplace injury, and does not affect the preemptive effect the BIA enjoys relative to railroad locomotive parts or materials. The FRA has announced its intention to maintain control, pursuant to

8. *Id* at 338.

its statutory authority, "in respect to the design of locomotives and other rolling equipment used on a railroad."[9] The scope of preemption under the BIA has been announced, in relevant part, by the U.S. Supreme Court as encompassing "whatever in fact is an integral or essential part of a completed locomotive * * *."[10] If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted.[11]

29 U.S.C. 653(b)(1) provides: "[n]othing in this Act shall apply to working conditions of employees with respect to which other Federal agencies, * * * exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." Regulations of the material used to construct a locomotive or a part thereof, can clearly relate to occupational safety and is clearly within the zone of preemption of the BIA. With its express preemption of the regulation of the parts and materials used on locomotives, and its professed intention to do so, the BIA prohibits any interference by OSHA, because OSHA is concerned with non-specialized workplace safety concerns that do not take into account the FRA's duty, under the BIA, to ensure uniform regulation of locomotive parts and materials throughout the United States.

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9. *Norfolk Southern Ry. Co. v. Denson* (2000), 774 So.2d 549, *citing 43 Fed.Reg. 10587.*

10. *Southern Railway Co. v. Lunsford* (1936), 297 U.S. 398, 56 S.Ct. 504, 80 L.Ed. 740.

11. *Silkwood v. Kerr-McGee Corp.* (1984), 464 U.S. 238, 248, 104 S.Ct. 615, 78 L.Ed.2d 443.

Appendix C

The Darby Group next advocates that, because the BIA, by its express terms, only includes railroad carriers, that manufacturers of parts and materials used in constructing locomotives are necessarily excluded from its preemptive reach. We disagree. The Second, Sixth, and Ninth Circuit Federal Courts have explicitly addressed, and rejected, this conclusion.

"Although the word 'manufacturer' does not appear in the BIA, the scope of the Act includes both the 'design' and 'construction' of a locomotive's parts. * * * Two other circuits have addressed the issue of whether the BIA includes manufacturers, and we agree with their conclusion that it does. * * * Where, as here, the design and construction of a part are in the hands of a manufacturer, the results that Congress had hoped to obtain through the BIA would be accomplished best by including the manufacturer within the statute's coverage.

"[The Plaintiff's] contention that the BIA serves only to preempt state statutory enactments but not common law remedies is equally unavailing. In reaching this conclusion, we again agree with the two other circuits that have addressed this issue. * * * This holding is necessary to keep the locus of regulation at the federal level and maintain the uniformity that is a goal of the BIA. As the [United States] Supreme Court has noted, an award of damages can act as a 'potent method of governing conduct and controlling policy.' * * * For a locomotive carrier or manufacturer, the source of the damages, whether statutory or common law, is irrelevant, and both must therefore be preempted by the BIA."[12]

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12. *Oglesby,* supra, 180 F.3d at 462.

Appendix C

Were we to accept The Darby Group's position, regulation of the materials used in locomotive parts would transfer to whatever state imposed the most stringent product design and composition standards upon manufacturers, because national compliance could only be effected by complying with the state offering the most exposure to liability.[13] Since the BIA expressly grants the Department of Transportation the authority to promulgate regulations regarding inspection and mandated testing of locomotives, a harsher state requirement would conflict and, therefore, be of no effect, considering *Napier's* express determination that the BIA preempts the field regarding materials and parts used in assembling locomotives.

The Darby Group next contends that, absent privity, common law or statutory products liability claims against parts manufacturers did not exist in 1911 when the original BIA was enacted, so Congress could not have intended to preempt them. This argument overlooks the fact that the BIA was passed to ensure that common rail carriers operated under a single set of regulations to ensure workplace safety in an historically dangerous environment, national uniformity of infrastructure and ease of interstate movement. Its primary focus was not to restrict an injured worker's redress. The "field" of preemption contemplated by Congress, as found by *Napier,* was, in part, any law dealing with the design and material used for every part of a locomotive, to whatever purpose.

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13. *Law,* supra, 114 F.3d at 911-912.

Appendix C

Finally, the Darby Group claims that, notwithstanding the BIA, *Silkwood v. Kerr-McGee Corp.*,[14] and *Medtronic, Inc. v. Lohr,*[15] specifically support a finding that Viad would be appropriate defendants for their claims of tort liability. In *Silkwood,* the plaintiff's daughter was injured by exposure to dangerous levels of radiation in a nuclear laboratory and the defense, asserting that the Atomic Energy Act retained exclusive jurisdiction over the regulation and operation of nuclear power facilities, claimed that the father was not entitled to punitive damages. In *Medtronic,* the plaintiff sued a medical device manufacturer when her pacemaker failed, and the defendant argued that the Medical Device Amendments of 1976 precluded recovery for state tort claims because the tort claims involved determining requirements for medical devices outside of the Federal approval process.

The United States Supreme Court noted in both cases that tort remedies are primarily state-oriented remedies which should not be foreclosed through preemption absent explicit congressional intent. In each case, it placed great emphasis on the lack of a demonstrated intent by Congress to foreclose state tort remedies; on the tangential effect state tort suits would have on the ability of the federal government to carry out its intended function in enacting the respective laws it did; and on the absence of any recovery at all for the plaintiffs, should preemption be found.

Such is not the case here. The Darby Group has recourse under a specifically enacted Federal scheme of recovery: the

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14. (1984), 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 443.

15. (1996), 518 U.S. 470, 116 S.Ct. 2240, 135 L.Ed.2d 700.

FELA. In addition, permitting product liability claims against manufacturers of the asbestos-containing locomotive components here would directly, and could, potentially, seriously impact the ability of the FRA to control the specifications of components on locomotives traveling on its uniform, nationwide tracks. Considering the importance placed on uniformity in a nationwide rail network and the availability of a remedy for Darby and his co-plaintiffs, we think preemption of claims against manufacturers is the wiser course.

Judgment affirmed.

It is ordered that appellee shall recover of appellant costs herein taxed.

The court finds that there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA A. BLACKMON, P.J., concurs.

TERRENCE O'DONNELL, J., concurs in judgment only.

N.B. This entry is an announcement of the court's decision. See *App.R. 22(B)*, *22(D)* and *26(A)*; Loc.App.R.22. This decision will be journalized and will become the judgment and order of the court pursuant to *App.R. 22(E)*, unless a motion for reconsideration with supporting brief, per *App.R. 26(A)* is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per *App.R. 22(E)*. See, also, S.Ct.Prac.R. II, Section 2(A)(1).

APPENDIX D — TRIAL ORDER OF THE COURT OF COMMON PLEAS, CUYAHOGA COUNTY, OHIO DATED APRIL 11, 2002

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

CASE NOS. 377123

JUDGE HARRY HANNA

FOREST L. DARBY, et al.

Plaintiffs,

vs.

A-BEST PRODUCTS COMPANY, et al.,

Defendants.

ORDER

Upon due consideration, the motion of Forest L. Darby to amend complaint and add New Party Defendants is hereby overruled as to Defendants Viad, Vapor, and Baldwin-Lima-Hamilton, and granted as to the other defendants. There is no just reason for delay.

IT IS SO ORDERED.

JUDGE HARRY A. HANNA
FILED ON CLAD 4-11-2002

APPENDIX E — STATUTORY PROVISIONS

45 U.S.C.A. § 51

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any

way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Title 49. Transportation
Subtitle V. Rail Programs
Art A. Safety
Chapter 207. Locomotives
49 § 20701. Requirements for use

A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances—

(1) are in proper condition and safe to operate without unnecessary danger of personal injury;

(2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter; and

(3) can withstand every test prescribed by the Secretary under this chapter.

Appendix E

49 § 20702. Inspections, repairs, and inspection and repair reports

(a) General.—The Secretary of Transportation shall—

(1) become familiar, so far as practicable, with the condition of every locomotive and tender and its parts and appurtenances;

(2) inspect every locomotive and tender and its parts and appurtenances as necessary to carry out this chapter, but not necessarily at stated times or at regular intervals; and

(3) ensure that every railroad carrier makes inspections of locomotives and tenders and their parts and appurtenances as required by regulations prescribed by the Secretary and repairs every defect that is disclosed by an inspection before a defective locomotive, tender, part, or appurtenance is used again.

(b) Noncomplying locomotives, tenders, and parts.—(1) When the Secretary finds that a locomotive, tender, or locomotive or tender part or appurtenance owned or operated by a railroad carrier does not comply with this chapter or a regulation prescribed under this chapter, the Secretary shall give the carrier written notice describing any defect resulting in noncompliance. Not later than 5 days after receiving the notice of

noncompliance, the carrier may submit a written request for a reinspection. On receiving the request, the Secretary shall provide for the reinspection by an officer or employee of the Department of Transportation who did not make the original inspection. The reinspection shall be made not later than 15 days after the date the Secretary gives the notice of noncompliance.

(2) Immediately after the reinspection is completed, the Secretary shall give written notice to the railroad carrier stating whether the locomotive, tender, part, or appurtenance is in compliance. If the original finding of noncompliance is sustained, the carrier has 30 days after receipt of the notice to file an appeal with the Secretary. If the carrier files an appeal, the Secretary, after providing an opportunity for a proceeding, may revise or set aside the finding of noncompliance.

(3) A locomotive, tender, part, or appurtenance found not in compliance under this subsection may be used only after it is—

(A) repaired to comply with this chapter and regulations prescribed under this chapter; or

(B) found on reinspection or appeal to be in compliance.

(c) Reports.—A railroad carrier shall make and keep, in the way the Secretary prescribes by regulation, a report of every—

(1) inspection made under regulations prescribed by the Secretary; and

(2) repair made of a defect disclosed by such an inspection.

(d) Changes in inspection procedures.—A railroad carrier may change a rule or instruction of the carrier governing the inspection by the carrier of the locomotives and tenders and locomotive and tender parts and appurtenances of the carrier when the Secretary approves a request filed by the carrier to make the change.

49 §20703. Accident reports and investigations

(a) Accident reports and scene preservation.—When the failure of a locomotive, tender, or locomotive or tender part or appurtenance results in an accident or incident causing serious personal injury or death, the railroad carrier owning or operating the locomotive or tender—

(1) immediately shall file with the Secretary of Transportation a written statement of the fact of the accident or incident; and

(2) when the locomotive is disabled to the extent it cannot be operated under its own power, shall preserve intact all parts affected by the accident or incident, if possible without interfering with traffic, until an investigation of the accident or incident is completed.

(b) Investigations.—The Secretary shall—

(1) investigate each accident and incident reported under subsection (a) of this section;

(2) inspect each part affected by the accident or incident; and

(3) make a complete and detailed report on the cause of the accident or incident.

(c) Publication and use of investigation reports.—When the Secretary considers publication to be in the public interest, the Secretary may publish a report of an investigation made under this section, stating the cause of the accident or incident and making appropriate recommendations. No part of a report may be admitted into evidence or used in a civil action for damages resulting from a matter mentioned in the report.

Current through P.L. 108-323 (excluding P.L. 108-311) approved 10-06-04

APPENDIX F — CHAPTER 10 — OTHER FACTORS AFFECTING LOCOMOTIVE CAB WORKING CONDITIONS

FRA examined locomotive crew exposure to vibration and asbestos. Vibration can cause visual acuity problems and, when significant and/or combined with other factors; physiological effects. FRA conducted a review of open literature on the subject matter, and this chapter provides a summary of the findings.

FRA believes the best way to evaluate cab vibration is to conduct instrumented vibration measurements and studies, evaluate whether new cab designs successfully reduce vibration levels, and — if applicable — develop vibration guidelines.

The two primary locomotive manufacturers stopped using asbestos in their locomotives in the 1970's, and FRA has not identified sources of friable asbestos to which crew members could be exposed. Based on this fact and the small number of earlier vintage locomotives still in use, asbestos is not considered an issue.

In addition to the working conditions addressed in previous chapters, FRA also evaluated two other factors that are not currently covered in FRA regulations, but which can affect the working conditions aboard locomotives — vibration and asbestos. This chapter discusses the source of vibration and asbestos in current locomotives, the health and safety effects associated with their presence, and recommended actions to minimize or eliminate these effects on the performance of the locomotive crew.

Appendix F

Vibration

Vibration — and its associated effects on health, proficiency, and comfort-is inescapable given current locomotive design. The Volpe National Transportation Systems Center (VNTSC) and FRA have identified three major sources of vibration in locomotive cabs[1]:

- reciprocating equipment (engines, compressors, alternators, superchargers and the like);

- conduct vibration measurements and studies[10];

- determine whether vibration may physiologically and/or psychologically harm the locomotive crew over an extended period of time;

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1. "Human Factors Guidelines for Evaluation of the Locomotive Cab," prepared by Jordan Multer, Robert Rudich, and Kevin Yearwood, U.S. Department of Transportation, Research and Special Programs Administration; John A. Volpe, Volpe National Transportation Systems Center, Cambridge, MA 02142

10. Measurements of operational vibrations on all three axes, including those in the 1 to 10 Hz range, are needed to determine actual vibration conditions in the cab. Once these levels are known, the need and potential benefit of more extensive—and expensive—control can be determined.

- evaluate whether new cab designs successfully address reduced vibration levels in locomotive cabs; and

- develop applicable vibration guidelines.

Asbestos

Review of Existing Asbestos Research and Literature[11]

Asbestos is a filamentous mineral useful because of its resistance to heat. Its primary use earlier in this century was as an insulating material, but in more recent years it has found widespread use in a number of other industries.

When asbestos is inhaled and deposited in the alveoli[12], it is ingested by macrophages[13], and via mechanisms that are not currently clear, lead to the development of diffuse lung damage and the formation of fibrosis. Asbestos can lead to the development of a malignant tumor of the lining of the chest cavity and lung surface called mesothelioma, and, in association with cigarette smoking, can lead to an increased incidence of bronchogenic carcinoma.

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11. Industrial Toxicology: Safety and Health Applications in the Workplace; Edited by Phillip L. Williams & James L. Burson, 1985

12. Alveoli is an air sac of the lungs at the termination of a bronchiole.

13. Macrophage is a large phagocytic cell of the reticuloendothelial system.

Appendix F

The diagnosis of asbestosis depends upon a well-documented history of exposure, an accurate estimate of the degree of exposure, and a characteristic clinical picture. The patterns of impairment seen with asbestos exposure usually take 20 to 40 years to develop. There is evidence that lower exposure can lead to the development of mesothelioma. Individuals who develop moderate to severe degrees of asbestosis have a poor prognosis, and those who develop malignant mesothelioma have an exceedingly poor outlook in that mesothelioma cannot be removed surgically, nor is it amenable to irradiation therapy or chemotherapy. The outlook for those individuals who develop associated bronchogenic carcinoma is the same for those who develop lung cancer and who have not been exposed to asbestos—that is, the 5-year survival rate is about 5 to 10 percent.

The long-term health consequences of this exposure are unknown. It is highly unlikely that this small degree of exposure could lead to the development of the interstitial fibrotic pattern of impairment, but there is a possibility that such exposure could lead to an increased incidence of mesothelioma and, in smokers, to an increased incidence of bronchogenic carcinoma.

OSHA: Final Asbestos Rules[14]

In the August 10, 1994 *Federal Resister*, OSHA published final regulations to protect workers from exposure to asbestos. The rules, which cover four million workers and are estimated to cost $361.2 million annually, went into effect

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14. Occupational Hazards, Sept 1994, OSHA: Final Asbestos Rule Covers 4 Million Workers

on October 11, 1994. This OSHA rule applies to railroad operating employees.

At a press conference at OSHA-headquarters, Assistant Secretary of Labor (OSHA), Joseph A. Dear said the rules will ensure effective long-term management of asbestos. OSHA has reduced the permissible exposure limit (PEL) from 0.2 fibers per cubic centimeter of air as an 8-hour time-weighted average to 0.1 fibers per cubic centimeter.

Asbestos in the Locomotive Cab

When steam generators were used on locomotives in passenger service, asbestos cement was used to insulate the heater coils to prevent loss of heat and contain the fire. Whenever the steam generator was disassembled and the coils had to be removed, the asbestos cement was broken up and removed, releasing asbestos particles which could be inhaled into the lungs. This source of asbestos was eliminated in the 1970's, when the head end power system was developed for the heating of passenger trains with electricity.

GE and EMD, the two primary manufacturers of current locomotives, made the following statements regarding asbestos in their locomotives:

- GE[15] stated that asbestos has not been permitted in any facet of their locomotive production since October 1979. In addition, GE stated that there is no record of asbestos

15. Mr. R. Shults, Manager-Product & Environment Impact, General Electric Company (GE)

ever being used in the cab environment of its locomotives. Further, GE informed each of their outside suppliers in mid-1987 that all sub-assemblies provided for the production of locomotives must be free of asbestos.

- EMD[16] stated that of their 12 specifications for sound and thermal insulation applications, only one contained asbestos as a filler with a resin bonded fiberglass and only fiberglass was used as a loose insulating material. An EMD service bulletin was issued on April 6, 1984, prohibiting the use of asbestos for any purpose in locomotive construction. This restriction also is applied to outside contractors supplying sub-assemblies for the production of locomotives. In the 1970's, EMD began to curtail the use of asbestos in locomotive construction depending upon the location. EMD had identified 60 pages of part numbers which contained asbestos in some force in previous locomotive construction; however, these parts have been discontinued.

Conclusions

FRA has reviewed literature outlining the known health and safety effects of asbestos exposure, and contacted representatives from both primary locomotive manufacturers

16. Mr. Widdman, Electro Motive Division (EMD)

regarding the present and past use of asbestos in the construction of locomotives. While previous locomotive design incorporated the use of asbestos, and older locomotives remaining in service may still contain limited amounts of asbestos, there is no evidence that the presence of asbestos poses a problem to humans or the environment. The use of asbestos in locomotive production was terminated many years ago, and both primary manufacturers currently have policy statements prohibiting the use of asbestos in locomotive construction. Based on the above, FRA does not feel that further action with respect to the presence of asbestos in locomotive cabs is warranted at this time.

(2)

No. 04-574

Supreme Court, U.S.
FILED
DEC 28 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

FOREST L. DARBY,

Petitioner,

v.

A-BEST PRODUCTS, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Ohio

BRIEF OF RESPONDENT OLD ORCHARD INDUSTRIAL CORP., INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO VAPOR CORPORATION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does this Court have jurisdiction to hear this matter under 28 U.S.C. § 1257 in the absence of a final order dismissing the entire action below?

II. Did the Supreme Court of Ohio, following overwhelming federal and state appellate precedent applying this Court's decision in *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605 (1926), correctly hold that the Boiler Inspection Act – enacted with congressional intent to occupy the entire field of locomotive regulation – preempts petitioner's state common-law tort claims against locomotive equipment manufacturers?

PARTIES TO THE PROCEEDING

The Petitioner is Forest L. Darby.

The Respondents are Old Orchard Industrial Corp., Viad Corp. and A-Best Products Company.

Pursuant to Rule 26 of the *Supreme Court Rules*, Old Orchard Industrial Corp. states that it is a wholly owned subsidiary of Brunswick Corporation, a publicly traded entity.

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STATEMENT OF THE CASE

Respondent Old Orchard Industrial Corp. states that the background information provided in the Petition for Writ of Certiorari is generally correct. The only correction would be that Respondent Old Orchard's predecessor-in-interest, Vapor Corporation, manufactured a locomotive part, not the entire locomotive.

REASONS TO DENY THE PETITION

I. NO FINAL ORDER HAS BEEN ENTERED.

This Court should decline to address the issues involved herein because there is no final order or judgment in this case. The jurisdiction of this Court to review decisions of the highest courts of each state is primarily limited to the review of a "final judgment or decree." 28 U.S.C. § 1257. The exceptions to the final judgment limitation are "very few." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (outlining the four categories of exceptions to this Court's jurisdictional requirement of a final order). None of those exceptions apply to this case.

Petitioner's claims against a large number of defendants remain. Even though the trial court's determination as to the claims asserted by the Petitioner against the Respondents is final, no final order has been entered for the entire case. The trial court denied Petitioner's Motion to Amend the Complaint to add the Respondents as party-defendants on the basis of federal preemption, but the trial court did permit the Petitioner to add several new defendants. (*See* Petitioner's Appendix A, at 2a-4a). In addition, numerous defendants remain from the original Complaint. Although a number of the defendants have likely settled or been dismissed, no final order dismissing

the case in its entirety has been entered. The appeal proceeded in the Ohio court system based on the trial court's determination that "there was no just reason for delay" as to the claims against the Respondents, *id.* at 4a, not because a final order has resolved the case in its entirety.

Although the Ohio appellate courts could proceed with the appellate process, this Court should be reluctant to entertain the appeal at this time. What other potential reviewable issues may surface in the case as to the remaining defendants are unknown at this point. Nevertheless, the claims against the remaining defendants in the case present, at the very least, numerous due process pitfalls, and could result in additional appeals for this Court's review.

The primary purpose of the final judgment requirement for this Court's review is to avoid piecemeal reviews of the case. *Construction & General Laborers' Union v. Curry*, 371 U.S. 542, 550 (1963). If the Court rules on the issues presented in the Petition, remaining issues in the case as to other defendants may result in a return of the case to this Court. Until all of the claims against all of the defendants in the case are resolved, this Court's requirement for the review of a final order, has not been met. Thus, the denial of the writ is appropriate.

II. THE OHIO SUPREME COURT CORRECTLY APPLIED PREEMPTION ANALYSIS AND RELIED UPON PRIOR RULINGS OF THIS COURT.

Even if the Court determines that a sufficient final order has been entered with respect to the Respondents, the Ohio Supreme Court correctly applied the federal law and the preemption analysis which this Court has repeatedly

outlined. This Court has already decided the federal questions involved in the Ohio Supreme Court's decision. The Ohio Supreme Court relied upon and correctly applied this Court's holding in *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605 (1926), as to the scope of the preemptive field of the Locomotive Boiler Inspection Act (49 U.S.C. § 20701 *et seq.* ("BIA")).

Moreover, the issue of whether Congress intended the BIA to preempt state law claims has been addressed in on-point opinions by the courts of last resort of four states, inclusive of Ohio, and at least four United States Courts of Appeals. The Ohio Supreme Court's decision is wholly in agreement with every one of these appellate court decisions. All of these courts agree with the decision of the Ohio Supreme Court, which Petitioner seeks to appeal. Because all of the state courts of last resort and the United States Courts of Appeal have been unanimous in favor of preemption and because all of the federal questions raised by the Petitioner have previously been determined by this Court, the denial of the Petition for Writ of Certiorari is appropriate.

A. The Ohio Supreme Court Correctly Applied the Federal Preemption Analysis Set Forth in Multiple Cases by this Court.

The United States Constitution provides that federal law "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2, quoted in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001). Federal law preempts state law where (1) the state law conflicts with federal law or compliance with both state and federal law is impossible; (2) Congress has legislated comprehensively, thus occupying an entire field of regulation and

leaving no room for the states to supplement federal law; (3) federal law expressly preempts the state law; or (4) state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress or interferes with the methods by which the federal statute was designed to reach Congress's goal. *See Louisiana Pub. Serv. Comm'n v. Fed. Communications Comm'n*, 476 U.S. 355, 368-69 (1986); *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 103 (1992); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

The Petitioner asserts that the Ohio Supreme Court failed to begin its analysis with a presumption against preemption. However, this Court recently unequivocally held that there is no "'assumption' of non-pre-emption . . . when the State regulates in an area where there has been a history of significant federal presence." *U.S. v. Locke*, 529 U.S. 89, 108 (2000) (national and international maritime commerce). In this case, as in *Locke*, "Congress has legislated in the field from the earliest days of the Republic, creating an extensive federal statutory and regulatory scheme." *Id.; see also Carrillo v. ACF Ind., Inc.*, 20 Cal. 4th 1158, 1163, 86 Cal. Rptr. 2d 832, 890 P.2d 386 (1999). Thus "there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers." *Locke*, 529 U.S. at 108.

B. As this Court Determined in *Napier*, through the BIA, the United States Congress has Enacted a Comprehensive Regulatory Scheme, Which Preempts the Entire Field of Locomotive Safety and Equipment.

This Court has already explicitly addressed the preemption power of the BIA in *Napier*, holding that the

BIA occupies the entire field. The Court examined the scope of the BIA and found that the United States Congress had preempted the entire field of locomotive safety and equipment, which encompasses all state law within the scope of authority delegated to the Secretary of Transportation including the design, construction and materials of locomotives and their parts. *Napier*, 272 U.S. at 611-13.

It has been settled for almost 80 years, since this Court's decision in *Napier*, that the preemptive scope of the BIA precludes all state law respecting locomotives and locomotive parts, material or equipment used in interstate commerce. *Napier* held that Congress intended the BIA "to occupy the field" in respect of all areas subject to the BIA, and that the BIA accordingly preempted all state law within the BIA's grant of authority to the Interstate Commerce Commission. 272 U.S. at 613. Those areas include "the design, the construction, and the material of every part of the locomotive" – the "'entire locomotive . . . and all parts and appurtenances thereof.'" *Id.* at 611, 608.

At issue in *Napier* were Georgia's and Wisconsin's laws requiring fire box doors and cab curtains on all locomotives operating in those states. The court ruled that the BIA preempted such laws even though it found or assumed that (1) there was no conflict between the devices required by the states and those required by federal rules, (2) the state laws promoted safety, and (3) the state rules would no more than incidentally interfere with commerce. 272 U.S. at 610-11. This Court found *that* the BIA conferred on the Commission "general" power to regulate locomotive safety equipment, *id.* at 611-12; that the state requirements were "within the scope of the authority delegated to the Commission" by the BIA, *id.* at 611; and that BIA's grant to the Commission of that general power preempted all state law falling within the scope of the Commission's authority. *Id.* at 613.

State law concerning "the design, the construction, or the material" of any part or appurtenance of the locomotive is thus preempted because it is within the Commission's authority – whether or not the state law conflicts with the federal rule, and whether or not there is any applicable federal rule at all (*Napier*, 272 U.S. at 613 (emphases added)):

> *It is also urged that, even if the Commission has power to prescribe* an automatic firebox door and a cab curtain, *it has not done so, and that it has made no other requirement inconsistent with the state legislation. This, . . . if true, is without legal significance.* The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the act delegating the power. We hold that state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field.

Napier remains the law of the land.[1] The locomotive parts that Petitioner attempted to claim were defective in the action below fall squarely "within the scope" of FRA's authority, and thus, within the preempted field. *Napier*, 272 U.S. at 611. The following appellate holdings agree that *Napier* still controls: *Oglesby v. Delaware & Hudson Ry. Co.*, 180 F.3d 458 (2nd Cir.), *cert. denied sub nom. Oglesby v. General Motors Corp.*, 528 U.S. 1004 (1999); *Consolidated Rail Corp. v. Pennsylvania Pub. Util. Comm'n*, 536 F. Supp. 653, 657 (E.D. Pa.), *aff'd*, 696 F.2d

[1] Indeed, in 1983, this Court summarily affirmed a decision that "locomotive equipment" is "an area totally preempted by" the BIA. *Consolidated Rail Corp. v. Pennsylvania Pub. Util. Comm'n*, 536 F. Supp. 653, 657 (E.D. Pa.), *aff'd*, 696 F.2d 981 (3d Cir. 1982), *aff'd*, 461 U.S. 912 (1983). The Supreme Court's summary affirmance is a binding precedent. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975).

981 (3rd Cir. 1982), *aff'd*, 461 U.S. 912 (1983); *Missouri Pacific R. Co. v. Railroad Comm'n of Texas*, 833 F.2d 570 (5th Cir. 1987); *United Transp. Union v. Foster*, 205 F.3d 851, 860-61 (5th Cir. 2000); *Springston v. Consolidated Rail Corp.*, 130 F.3d 241, 245 (6th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998); *First Security Bank v. Union Pacific R. Co.*, 152 F.3d 877 (8th Cir. 1998); *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1152 (9th Cir. 1983); *Law v. General Motors Corp.*, 114 F.3d 908, 910 (9th Cir. 1997); *Forrester v. American Dieselelectric, Inc.*, 255 F.3d 1205 (9th Cir. 2001); *King v. Southern Pacific Transp. Co.*, 855 F.2d 1485, 1489 n.2 (10th Cir. 1988); *Norfolk Southern Ry. Co. v. Denson*, 774 So. 2d 549, 553-55 (Ala. 2000); *Scheiding v. General Motors Corp.*, 22 Cal. 4th 471, 93 Cal. Rptr. 2d 342, 993 P.2d 996, *cert. denied*, 531 U.S. 958 (2000); *Central of Georgia R. Co. v. Markert*, 200 Ga. App. 851, 410 S.E.2d 437, *cert. denied*, 200 Ga. App. 895 (1991); *Key v. Norfolk Southern Ry. Co.*, 228 Ga. App. 305, 491 S.E.2d 511 (1997); *In re Train Collision at Gary, Indiana*, 670 N.E.2d 902 (Ind. App. 1996), *appeal denied sub nom., Dillon v. Chicago Southshore & South Bend R. Co.*, 683 N.E.2d 591 (Ind.), *cert. denied sub nom., Dillon v. Northern Indiana Commuter Transp. Dist.*, 522 U.S. 914 (1997); *Furlough v. Union Pacific R. Co.*, 766 So. 2d 751, 761-62 (La. App. 2000), *writ denied*, 781 So. 2d 556 (2001); *Kilgore v. General Motors Corporation*, 853 So.2d 171 (Ala. 2002); *West Virginia Asbestos Litigation*, 592 S.E.2d 818 (W.Va. 2003).

As this Court explicitly stated in *Napier*, 272 U.S. at 611:

> The LBIA provides exclusive federal authority to regulate the design, construction and material of every part of the locomotive and tender as well as all appurtenances. . . . The LBIA preempts any state law that regulates locomotive

equipment because the LBIA was enacted with the congressional intent to occupy the field of locomotive equipment.

Railroads have been "subject to comprehensive federal regulation for nearly a century." *Carrillo*, 20 Cal. 4th at 1163, (quoting *United Transp. Union v. Long Island R. Co.*, 455 U.S. 678, 687 (1982)). Congress "inten[ds] that railroads should be regulated primarily on a national level through an integrated network of federal law," and has regulated "almost all aspects of the railroad industry, including rates, safety, labor relations, and worker conditions." *R.J. Corman R. Co. v. Palmore*, 999 F.2d 149, 152 (6th Cir. 1993).

The federal government has specifically regulated the design, maintenance, and safety of locomotives for over a hundred years. In 1893, Congress enacted the first of the Safety Appliance Acts ("SAA"), and in 1911 it followed with the BIA, now known as the Locomotive Inspection Act. The SAA and BIA – enacted with the same Congressional purposes, *Urie v. Thompson*, 337 U.S. 163, 190 (1949) – are now codified, respectively, at 49 U.S.C. §§ 20301-20306 and 20701-20903 (1994).

The BIA grants federal regulators authority over "the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances." *Napier*, 272 U.S. at 611-13. The BIA requires locomotives to be "safe to operate without unreasonable danger of personal injury," 49 U.S.C. § 20701, and to that end vests in the Secretary of Transportation, rule-making power adequate to protect employees against disease as well as against accidents, and "the power to make rules for employee health has been exercised." *Urie*, 337 U.S. at 193 (BIA covered employee injury from long-term inhalation of sand dust on locomotive).

The Federal Railroad Administration ("FRA") regulates railroads under delegation of authority from the Secretary of Transportation. The FRA has exercised its authority to regulate the design, construction and material of the locomotive and all of its parts, including, for example, cab seats, wheel brakes, hand brakes, couplers, handholds, sill steps, running boards, and ladders, *see* 49 C.F.R. Part 229 (locomotive safety standards), and specifically motors (49 C.F.R. §§ 229.91, 229.93-101), the electrical system (49 C.F.R. §§ 229.77-91), exhaust stacks (49 C.F.R. § 229.43(a)), steam generators (49 C.F.R. §§ 229.103-113), brakes (49 C.F.R. §§ 229.46-59), and the cab (49 C.F.R. §§ 229.115-135).

The BIA mandates not only the design, construction and material, but also the inspection, testing and maintenance of locomotives. 49 U.S.C. § 20701; *see generally*, 49 U.S.C. §§ 20701-20903.1. Regulations under the BIA require daily inspections (49 C.F.R. § 229.21); thorough inspection and testing of gauges, electrical devices, insulation, steam generators, and other components every three months (49 C.F.R. § 229.23-25 and Form FRA F180-49A); and further tests annually and biennially (49 C.F.R. § 229.27-31).[2]

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[2] Under these regulations, for example, brake components must be "cleaned, repaired or replaced," a steam-generator component must be "removed and inspected," the main reservoir must be "hammer tested over its entire surface," "all internal and external surfaces" must be inspected at specified intervals, and a periodic inspection must be performed annually. 49 C.F.R. §§ 229.27, 229.31; *Lilly v. Grand Trunk Western R. Co.*, 317 U.S. 481, 486-87 (1943) (approving rules under the BIA requiring water tanks to "be maintained free from leaks," "inspected" and "cleaned, if necessary" at least once a month, and cab aprons to be "maintained in a safe and suitable condition").

The BIA has regulated inspection and maintenance since at least the 1930s. For example, when steam boilers were in common use, BIA

(Continued on following page)

The locomotive parts Petitioner here claims are defective fall squarely within the federal authority over "every part" of the locomotive. Steam generators are specifically regulated, 49 C.F.R. §§ 229.103-113, as are brakes, 49 C.F.R. §§ 229.46-59. Further, insulation must be inspected and kept in good condition, and must be present when the federal regulations require it. *See* 49 C.F.R. §§ 229.25(b) (requiring periodic inspection of "visible insulation"), 229.89 (prohibiting "[b]roken or badly chafed insulation" on certain connections), 229.41 (exposed pipes carrying hot gases or high voltage must be "equipped with guards to prevent personal injury"), and 229.83 (certain parts that may become electrically charged must be insulated).[3]

As further evidence that asbestos on locomotives falls within the purview of the federal government, Congress enacted the Rail Safety Enforcement and Review Act of 1992, Public Law 102-365, 106 Stat. 972, on September 3, 1992. Section 10 of that Act amended § 202 of the Federal Railroad Safety Act of 1970 (45 U.S.C. § 431) ("FRSA"), as amended by the 1992 Act, by adding at the end of § 202 a new subsection (t) requiring the Secretary of Transportation to assess "the extent to which environmental . . .

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regulations required periodic removal, partial disassembly, cleaning, inspection for cracks and other damage inside and out, and testing of the boilers. *See, e.g.*, 49 C.F.R. §§ 91.10-11, 91.16, 91.18, 91.304-05 (1939). BIA regulations expressly held railroads responsible for "repair" and maintenance of locomotives. 49 C.F.R. §§ 91.200, 91.12, 91.20 (1939).

[3] Federal regulation of locomotive insulation in fact extends back before the Petitioner would have begun working on or around locomotives. *See, e.g.*, former 49 C.F.R. § 91.16 (1939) ("lagging" [insulation] on boilers must be removed every five years); 49 C.F.R. § 91.254 (1939) ("a careful inspection of all visible insulation . . . shall be made and all defects repaired"); 49 C.F.R. § 91.253 (1939) (electrical insulation must be tested at least annually).

conditions in locomotive cabs affect . . . health," including consideration of "the effects on train crews of the presence of asbestos in locomotive components," and to "complete a rulemaking proceeding to consider prescribing regulations to improve the safety and working conditions of locomotive cabs." The 1992 Act required a "report to Congress on the reasons for that determination" if "the Secretary determines not to prescribe regulations."

Pursuant to this mandate, in September 1996, the FRA issued a Report to Congress addressing whether asbestos was a possible factor affecting locomotive cab safety and working conditions. It expressly found that asbestos on locomotives posed no health problem and that further regulation of asbestos was unwarranted. FRA Report to Congress, *Locomotive Crashworthiness and Cab Working Conditions* at 10-1, 10-12, 12-9 (1996).[4] (A copy of the relevant portions of this report is attached as Appendix F to the Petition for Writ of Certiorari).

The BIA is, in sum, comprehensive, and like its sister statutes, the SAA, "was intended to occupy the field." *Napier*, 272 U.S. at 611-13. The BIA's field includes "the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances," indeed any matter within federal regulators' authority under the BIA. *Napier*, 272 U.S. at 611-13. In addition, the BIA's field preemption is integral to Congress's scheme of promoting interstate commerce. Congress intended to ensure trains are subject to "one set of equipment regulations," so that the rules do not change when the trains cross state lines:

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[4] *See Arkansas Electric Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983) ("a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate . . . ").

> This broad preemptive sweep is necessary to maintain uniformity of railroad operating standards across state lines. Locomotives are designed to travel long distances . . . through interstate commerce. The virtue of uniform national regulation "is self-evident: locomotive companies need only concern themselves with one set of equipment regulations and need not be prepared to remove or add equipment as they travel from state to state."

Law v. General Motors Corp., 114 F.3d at 910 (quoting *Southern Pacific Transp. Co. v. Pub. Util. Comm'n of Oregon*, 9 F.3d 807, 811 (9th Cir. 1993)). Train regulation is "peculiarly [a subject] that calls for uniform law." *Carrillo*, 20 Cal. 4th at 1169. Otherwise, permitting state standards would require cars and locomotives to change "as they cross state lines, or adhere to the standard set by the most stringent state," and would undermine "Congress's goal of uniform federal railroad regulation." *Carrillo*, 20 Cal. 4th at 1169.

The Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.*, provides a uniform federal system of compensation for on-the-job injuries – "a mechanism that doesn't undermine the BIA's goal of uniformity." *Law*, 114 F.3d at 912. In a FELA action, the BIA "imposes upon the carrier an absolute and continuing duty to maintain the locomotive, and all parts and appurtenances thereof, in proper condition, and safe to operate in active service," *Southern Ry. v. Lunsford*, 297 U.S. 398, 401, 56 S. Ct. 504, 80 L. Ed. 740 (1936), and proof of a violation of this duty "is effective to show negligence as a matter of law" under FELA. *Urie*, 337 U.S. at 189. Congress intended the BIA, SAA and FELA to be considered together, *Urie*, 337 U.S. at 189, and preemption applies with special force to railroad workers' injuries (*Law*, 114 F.3d at 910):

> It has long been settled that Congress intended federal law to occupy the field of locomotive equipment and safety, particularly as it relates to injuries suffered by railroad workers in the course of their employment.

In 1970, Congress enacted the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. §§ 20101-20144 (1994). The FRSA is not limited to locomotives and authorizes the Secretary of Transportation to issue supplemental regulations in the area of railroad safety generally. The FRSA contains express preemption and savings clauses that severely restrict the power of states to regulate in respect of any aspect of railroad safety. 49 U.S.C. § 20106. The FRSA also explicitly underscores the importance of uniform laws relating to railroad safety: "[l]aws, regulations, and orders related to railroad safety shall be *nationally uniform* to the extent practicable." 49 U.S.C. § 20106 (emphasis added). Significantly, the FRSA purposely left the BIA "intact, including its preemptive effect." *Marshall v. Burlington Northern*, 720 F.2d at 1152-53; *Springston v. Consolidated Rail Corp.*, 130 F.3d 241, 245 (6th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998). Thus, the BIA is part of the comprehensive scheme of federal regulation over locomotive safety and equipment and preempts all state law today, just as it did almost 80 years ago when this Court definitely determined the preemptive scope of the BIA in *Napier*.

C. The BIA Precludes All State Regulation, including State Law Tort Claims.

Petitioner argues that state law is not preempted unless it conflicts with, frustrates or directly and substantially affects a federal law. (Petition for Writ of Certiorari ["Pet."] 19). However, Congress's relevant "intent" in occupying the field is "to exclude state regulation" from

the field, so any state law in the field necessarily "conflicts with" that intent and is preempted. *English v. General Electric Co.*, 496 U.S. 72, 79-80 n.5 (1990). "If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted," *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984), and "[t]he States must leave all regulatory activity in [the occupied field] to the Federal Government." *Michigan Carriers and Freezers Ass'n v. Agricultural Marketing and Bargaining Bd.*, 467 U.S. 461, 469 (1984).

Further, *Napier* and a long line of other cases reject the Petitioner's argument. This Court in *Napier* stated that a conflict or substantial effect on a federally regulated matter is irrelevant to field preemption. *Napier* found that state laws were preempted even if they promoted the same purpose as the federal act, *i.e.*, safety. 272 U.S. at 610-11, 613. Whether state law is "inconsistent with" federal requirements is "without legal significance"; so is whether the Commission "has not seen fit to exercise its authority" on the matter at all. *Id.* at 613. Consequently, a state law's having only an "incidental" effect on commerce does not save it. *Id.* at 611.

Every appellate court to address the issue agrees. "[A]ny state law that attempts to regulate within the domain is preempted," and the "relevant question" for preemption under the BIA "is not whether the federal government has exercised its authority [to regulate the subject of the claim] but whether it possesses the power in the first place." *Oglesby*, 180 F.3d at 461; *Springston*, 130 F.3d 241; *Law*, 114 F.3d 908; *First Security Bank v. Union Pacific R. Co.*, 152 F.3d at 880-81. Congressional occupation of the field "leaves no place for state common law actions," (1) whether "consistent, complementary, additional, or otherwise" to federal law and (2) although no

federal regulation directly speaks to the issue. *Carrillo*, 20 Cal. 4th at 1168 (citation omitted).

The Petitioner misstates field preemption analysis. There is no requirement to show particular actions preempted. *All* law in the field is preempted. In *Napier*, the Court did not inquire whether Congress had specifically considered curtains and fire doors; state law respecting them was preempted because the requirements were within the "broad scope of the authority conferred upon the Commission." 272 U.S. at 611. In *Oglesby*, *Springston*, *First Security* and *Law*, the Second, Sixth, Eighth and Ninth Circuits respectively found state-law claims preempted regardless of whether Congress (or the FRA) considered the "particular" equipment or claims there at issue, or even tort claims generally. Indeed, the Petitioner has it backwards. Because the BIA occupies the field, tort claims within the field are preempted *absent evidence Congress intended to preserve them*. *Carrillo*, 20 Cal. 4th at 1168-69.

Petitioner's claims here fall squarely within the field. Petitioner alleges that the Respondents' products were defective because their parts included asbestos materials. The Ohio Supreme Court correctly determined that the claims are therefore preempted because they directly attack the "design," "construction" and "material" of "part[s] of the locomotive." *Napier*, 272 U.S. at 611.

Regulation of all locomotive parts and materials is within the "broad scope of the authority conferred upon the [Secretary]." *Napier*, 272 U.S. at 611-13; *Law*, 114 F.3d at 911; *Oglesby*, 180 F.3d at 461. So, in particular, is the protection of employees against inhalation of hazardous substances. *Urie v. Thompson*, 337 U.S. at 193 (silicosis from inhalation of locomotive sanders). Indeed, the Secretary already regulates insulation under the authority

of the BIA, specifically considered regulating asbestos, and found further regulation of it unwarranted.

Field preemption "by definition means congressional intent generally extends beyond the express terms of the statute and regulations to all aspects coming within their contemplation," including common-law claims. *Carrillo*, 20 Cal. 4th at 1168;[5] *see also Geier v. American Honda Motor Co.*, 529 U.S. 861, 868-870; *Cipollone*, 505 U.S. at 521-23. That rule is squarely applicable to the BIA. *Oglesby*, 180 F.3d at 460-61, 462 (BIA preempts common-law defect and failure-to-warn claims concerning an engineer's seat); *Law*, 114 F.3d at 910-11 (BIA preempts common-law design defect and failure-to-warn claims concerning

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[5] A majority of the *Medtronic Inc. v. Lohr* Court stated that "insofar as the [Medical Device Amendments] preempt[ ] a state requirement embodied in a state statute, rule, regulation, or other administrative action, [they] would also pre-empt a similar requirement that takes the form of a standard of care or behavior imposed by a state-law tort action." 518 U.S. 420, 504-05 (1996) (Breyer, J., concurring); *accord*, 518 U.S. at 510-11 (O'Connor, J., joined by Rehnquist, Scalia and Thomas, JJ., dissenting) (preemption clause "clearly pre-empts any state common-law action that would impose a requirement different from, or in addition to, that applicable under the FDCA – just as it would pre-empt a state statute or regulation that had that effect"). *See Marks v. United States*, 430 U.S. 188, 193-94 (1977) (majority of Justices reaching conclusion by way of "fragmented" opinions state "the holding of the Court"). As Justice Breyer explained, it would be absurd to preempt requirements imposed by state legislative or regulatory bodies, but not state judicial bodies. "To distinguish between [state regulations and common-law tort suits] for pre-emption purposes would grant greater power (to set state standards 'different from, or in addition to,' federal standards) to a single state jury than to state officials acting through state administrative or legislative lawmaking processes." 518 U.S. at 504.

Petitioner also relies on *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238. It changes nothing. *See Scheiding*, 22 Cal. 4th at 480 ("unlike the situation in *Silkwood*, the field occupied by the BIA must necessarily extend to state law tort recovery").

insulation, engines and brakes); *Springston*, 130 F.3d at 244-45 (BIA preempts common-law negligence and strict liability design defect claims for failure to install better warning devices on locomotive); *Marshall v. Burlington Northern*, 720 F.2d at 1152; *Eldridge v. Missouri Pacific R.*, 832 F. Supp. 328 (E.D. Okla. 1993); *Central of Ga. R. Co. v. Markert*, 410 S.E.2d at 438 (similar); *In re Train Collision at Gary, Indiana*, 670 N.E.2d 902; *Key v. Norfolk Southern Railway Co.*, 491 S.E.2d 511; *cf. CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664, 675, 113 S. Ct.1732, 123 L. Ed. 2d 387 (1993) (FRSA preempts common-law claims); *Capozzi v. Blanchette*, 433 F. Supp. 704, 705 (W.D. N.Y. 1977) (FRSA preempts common-law design defect claim); *Ouellette v. Union Tank Car Co.*, 902 F. Supp. 5, 10 (D. Mass. 1995) (same).

Petitioner attempts to argue that the recent case of *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002), an express preemption case, has changed preemption analysis. (Pet. at 17-19). However, *Sprietsma* does not apply to the field preemption analysis herein. *Sprietsma* involved the determination of whether the Federal Boat Safety Act of 1971, 46 U.S.C. §§ 4301-4311 ("FBSA"), preempted a state common law tort action seeking damages primarily based on the alleged failure to install a propeller guard on a motor. 537 U.S. at 54-56. The FBSA contains an express preemption clause, but more importantly, contains the following express savings clause: "Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311. The Court found that the savings clause excludes common law tort claims from the scope of the express preemption clause. 537 U.S. at 63-64. This Court noted that the Secretary of Transportation had limited the scope of preemption by stating "[e]xisting state laws that regulated

matters not covered by the federal regulations continued to be exempted." *Id.* at 60 (citing 37 Fed. Reg. 15777-15785).

Further, the Court addressed arguments that the enactment of the FBSA implicitly preempted common law claims seeking to impose additional requirements on manufacturers, such as propeller guards. 537 U.S. at 64-70. However, given that the savings clause expressly preserved state common law tort claims, this Court found that the FBSA did not completely occupy the field. *Id.* Applying conflict preemption analysis and giving merit to the intentional placement of the savings clause in the statute, the Court determined common law claims were not preempted. Unlike the FBSA, the BIA does not save common law tort claims and as this Court found in *Napier*, completely occupies the field. Accordingly, Petitioner's reliance on *Sprietsma* is misplaced.

D. State Tort Claims against Locomotive and Locomotive Part Manufacturers are Preempted.

The Petitioner asserts that the preemptive scope of the BIA only applies to railroads, not manufacturers. (Pet. at 15). However, every federal court of appeals and every state supreme court to consider the issue agrees that the BIA preempts state tort claims against manufacturers. The Second Circuit so held in *Oglesby*, 180 F.3d 458, as did the California's Supreme Court in *Scheiding*, 22 Cal. 4th 471, the Alabama Supreme Court in *Kilgore v. General Motors Corporation*, 853 So.2d 171, and the West Virginia Supreme Court of Appeals in *West Virginia Asbestos Litigation*. The Ninth and Sixth Circuits have likewise so held. As the Ninth Circuit stated in *Law*, the "distinction

[between manufacturers and railroads] . . . is without significance" because "[i]mposing tort liability on railroad equipment manufacturers" would force them to conform to state standards, thereby "transfer[ring] the regulatory locus from the Secretary of Transportation to the state courts – a result the BIA was clearly intended to foreclose." 114 F.3d at 911-12. *Accord*, *Springston*, 130 F.3d at 244-45 (defect claim against manufacturer preempted); *In re Train Collision at Gary, Indiana*, 670 N.E.2d 902 (same).

Preemption depends on whether a claim is within the preempted field, not on who the defendant is. *Taylor AG Ind. v. Pure-Gro*, 54 F.3d 555, 562 (9th Cir. 1995) ("Under *Cipollone*, the analysis focuses not on whom the legal duty is imposed, but on whether the legal duty constitutes a state law requirement. . . . "). Thus, it is *what* is regulated, not *who* is regulated, that matters. What is regulated here is "the design, the construction, and the material" of locomotive "part[s]" and "appurtenances." *Napier*, 272 U.S. at 611. Since Petitioner's claims fall within the field, they are preempted. *Accord*, *Law*, 114 F.3d at 911-12.

The BIA covers manufacturers. Any "manufacturer . . . of railroad equipment" who violates or causes the violation of "any requirement of . . . the Locomotive Inspection Act" is subject to penalties. 49 C.F.R. §§ 229.7(b), 230.0. Accordingly, if a locomotive manufacturer violates applicable provisions of the BIA or FRSA or their regulations, its conduct is clearly within the enforcement reach of the Secretary of Transportation, and it would be subject to substantial civil penalties under § 21302. Further, the Secretary of Transportation has the exclusive discretion to determine who is subject to its regulations and to enforce them accordingly. *Id.*

Even if the penalty provisions were not directly applicable to manufacturers, the "realities of the business world" are that "[b]ecause railroad operators are liable for any injuries suffered by their employees, they would not buy locomotives, cars and other equipment that fall short of the BIA standards." Doing so not only would risk FELA damage awards, but would subject railroad operators to daily fines of up to $20,000 for every violation. Thus, "[l]ocomotive manufacturers already have every incentive to comply with federal standards." *Law*, 114 F.3d at 912.[6]

Moreover, because the preemptive field, namely, the "design, the construction, and the material of every part of the locomotive" is "in the hands of a manufacturer," Congress's intent to preempt that field "would be accomplished best by including the manufacturer within the statute's coverage." *Oglesby*, 180 F.3d at 462; *Law*, 114 F.3d at 911-12. Finally, it would make no sense, and defeat Congress's purpose, if claims respecting locomotive parts were preempted as to the railroad that buys them but not as to the manufacturer that sells them. Congress intended that "railroads should be regulated primarily on a national level through an integrated network of federal law." *R.J. Corman R. Co. v. Palmore*, 999 F.2d at 152. The "uniform national regulation" of locomotive equipment is a centerpiece of Congress's plan, and is designed to avoid subjecting locomotives to non-uniform standards from one state to the next. *Law*, 114 F.3d at 910.

As the Ninth Circuit explained in *Law*, "[a]part from compensating victims of accidents for their injuries, the

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[6] *Cf. Asahi Metal Indust. Co. v. Superior Court*, 480 U.S. 102, 115 (1987) (subjecting supplier of tire components to state court jurisdiction would "undoubtedly create[ ] an additional deterrent to the manufacture of unsafe components" but is unnecessary because "similar pressures will be placed on [the supplier] by [its] purchasers . . . ").

purpose of tort liability is to induce defendants to conform their conduct to a standard of care established by the state . . . " *Id.* at 910-11. The goal of the BIA is to prevent the paralyzing effect on railroads from patchwork requirements by each state concerning safety devices on locomotives crossing state lines. To facilitate this goal, the BIA applies to manufacturers of locomotives and their component parts as well as to railroad carriers. Petitioner's state tort claims concern the design, construction, and material of the locomotive, its parts and appurtenances, and those claims are preempted.

III. NOTHING HAS CHANGED SINCE THIS COURT DECLINED TO REVISIT THE PREEMPTIVE SCOPE OF THE BIA ON FOUR OCCASIONS IN THE LAST EIGHT YEARS.

By denying certiorari in *Dillon* (1997), *Springston* (1998), *Oglesby* (1999), and *Scheiding* (2000), this Court has rejected the opportunity to revisit the scope of the BIA four times in the last eight years. Undoubtedly, the Court has exercised its "judicial discretion" to deny such review precisely because federal law in this area was settled long ago by *Napier* and no federal court of appeals or state court of last resort has made a conflicting decision. *See* Sup. Ct. Rule 10, "Considerations Governing Review on Certiorari." The Ohio Supreme Court's decision was exactly the same as the decision appealed from the California Supreme Court in *Schieding*.

Nothing has changed since this Court denied the petitions for writ of certiorari in each of those four cases. Instead, as is discussed in more detail below, an even greater litany of cases has now agreed that Petitioner's claims fall within the field preempted by the BIA. Accordingly, as the Court in *Napier* found almost 80 years ago,

the BIA preempts the entire field of locomotive safety and equipment, including the design, construction and materials of the locomotive, its parts and appurtenances.

IV. THE OHIO SUPREME COURT'S DECISION IS IN AGREEMENT WITH EVERY OTHER APPELLATE COURTS ADDRESSING THE SAME ISSUES.

The Ohio Supreme Court's determination is entirely consistent with every other appellate court addressing BIA preemption of state law tort claims. The case law is unanimous in finding state law tort claims involving locomotive equipment are preempted by the BIA.

Three other state courts of last resort have specifically ruled on the issues raised by the Petitioner, the California Supreme Court in *Scheiding*, the Alabama Supreme Court in *Kilgore*, and the West Virginia Supreme Court of Appeals in *West Virginia Asbestos Litigation*. All three agree with the Ohio Supreme Court, and all three involved substantially identical facts as those at issue herein. In addition, the United States Courts of Appeals for the Second, Sixth, Eighth, and Ninth Circuits, *Oglesby, Springston, First Security,* and *Law*, respectively, have all reached the same conclusion as the Ohio Supreme Court.

***Scheiding v. General Motors Corp.*:** The California Supreme Court in *Scheiding v. General Motors Corp.*, *supra*, held that the BIA preempts asbestos claims against the manufacturers of locomotives. The court reviewed the history of BIA preemption and concluded that "*Napier* continues to articulate the preemptive scope of the BIA and thus forecloses state law causes of action against locomotive manufacturers for defective design of their product." The court ruled that all state causes of actions against locomotive manufacturers for asbestos exposure

are preempted by the federal BIA. Reiterating the rational from *Napier*, the court explained that the broad preemptive sweep is necessary to ensure uniform national regulation and avoid the need to remove or add equipment between states. *Scheiding,* 93 Cal. Rptr.2d at 345.

The court noted that in addition to compensating victims of accidents for their injuries, the purpose of tort liability is to induce defendants to conform their conduct to a standard of care established by the state. *Id.* at 345. If each state were to establish different liability triggering standards, manufacturers would be forced to sell locomotives whose equipment could be changed as the locomotive crossed each state line. Obviously, Congress's goal of uniform regulations would be undermined. *Id.*

The *Scheiding* court emphasized that imposing tort liability on locomotive manufacturers clearly would affect the design, the construction, and the material of locomotives. The imposition of tort liability on railroad equipment manufacturers would force them to conform to design and construction standards imposed by the states, transferring the locus from the Secretary of Transportation to state courts and thereby constraining the Secretary's regulatory authority and undermining the goal of uniformity. *Id.* at 348.

The *Scheiding* court also addressed the absence of any specific regulation of asbestos by the Secretary of Transportation. The court found that although there are no regulations regarding asbestos, such a regulatory scheme is entirely within the purview and the prerogative of the Secretary of Transportation. The court further stated that warning requirements are also within the scope of the Secretary's authority because the subject matter of any such labels would fall under the BIA. Accordingly, the California Supreme Court held that all claims of asbestos

exposure to asbestos on locomotives are preempted by the Boiler Inspection Act.

***Kilgore v. General Motors Corporation*:** The Alabama Supreme Court also found preemption under the BIA in *Kilgore v. General Motors Corporation*, 853 So.2d 171 (Ala. 2002). The plaintiffs asserted state law product defect and failure to warn claims against General Motors for their father's alleged exposure to asbestos from locomotives during his work for the railroad. The Alabama Supreme Court found that the trial court improperly denied GM's motion for summary judgment because the claims were preempted by the BIA. The court acknowledged *Napier* as the seminal case establishing the BIA's preemptive effect and agreed that the preemptive scope of the BIA included state law causes of action.

The court specifically addressed the Petitioner's assertion herein that the federal statute should be narrowly construed and that state tort law actions will not be preempted unless they specifically conflict with the federal statute. *Id.* at 177-78. Noting that this Court has already determined that the BIA occupies the entire field of locomotive equipment, the Alabama Supreme Court found that "narrowness is not an issue; the [BIA] preempts the entire field." *Id.* The court also dismissed the argument that there is a presumption against preemption by explaining that an "assumption of non-pre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence" as is the case with the railroad industry. *Id.* at 178 (*citing Locke*, 529 U.S. 89).

The court rejected the argument that the BIA preemption applies only if federal regulations specifically cover the disputed issue. Whether or not to regulate is clearly within the discretion of the Secretary of Transportation

because the regulations apply to locomotive equipment. The Court noted that the BIA does not explicitly regulate asbestos and explained that "Congress intended for the BIA to occupy the field; thus, the Secretary of Transportation has the discretion to regulate those areas he or she so chooses." *Id.* at 178-79. The Court agreed with the arguments made by the Respondents herein that the FRA has addressed asbestos and determined that no regulations are required. Consequently, the use of asbestos on locomotives is clearly within the preempted field.

***West Virginia Asbestos Litigation*:** The West Virginia Supreme Court of Appeals also tackled the identical issues raised herein and, likewise, found that the BIA preempts "state tort law claims against manufacturers of parts or components of railroad locomotives. . . . " *West Virginia Asbestos Litigation*, 592 S.E.2d 818 (W.Va. 2003). The plaintiffs alleged that the railroad and manufacturers had caused them to be exposed to asbestos, which resulted in their alleged injuries. *Id.* at 820. The court noted the twelve trial and appellate decisions, which have all found state law claims against railroad manufacturers are preempted by the BIA. *Id.* at 823-824. The court stated that "an overwhelming body of case law persuades us that, through the passage of the Boiler Inspection Act, Congress has occupied the field of railroad safety so pervasively that plaintiffs' claims against the defendants are preempted." 592 S.E.2d at 822. The West Virginia court went on to state that any other conclusion was "blocked by an avalanche of adverse authority from other jurisdictions, both state and federal." *Id.*

Consequently, all of the state courts of last resort which have addressed the issues have agreed with the Ohio Supreme Court decision below.

***Law v. General Motors Corp.*:** On three occasions, the Ninth Circuit has held that state common law tort claims against locomotive equipment manufacturers are preempted by the BIA. *See Law*, 114 F.3d at 913; *accord Forrester v. American Dieselelectric, Inc.*, 255 F.3d 1205 (9th Cir. 2001) (BIA preempted state common law tort claims of a non-railroad employee injured by locomotive crane); *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149 (9th Cir. 1983) (common law negligence action against railroad manufacturers alleging inadequate warning devices on a locomotive are preempted by the BIA). In *Law*, railroad employees brought various state common law tort actions for hearing loss against the manufacturers of locomotive engines and brakes. *Law*, 114 F.3d at 909.

In affirming the district court's dismissal based on BIA preemption, the Ninth Circuit noted that "[i]t has long been settled that *Congress intended federal law to occupy the field of locomotive equipment and safety, particularly as it relates to injuries suffered by railroad workers in the course of their employment.*" *Id.* at 910 (emphasis added). The court also recognized that the purpose of tort liability is an effort to persuade defendants to follow a standard of care that is established by the state common law, and the court rejected plaintiffs' argument that the field occupied by the BIA did not apply to state tort claims directed against manufacturers. *Id.* at 911.

The Ninth Circuit also rejected the plaintiffs' argument that injured railroad workers would be left without a remedy, finding Congress intended the FELA to be an exclusive remedy. *Id.* at 912. The court reasoned that placing the potential of liability for injuries to railroad workers solely upon the railroad employers would result in the railroads purchasing only from manufacturers whose products comply with the BIA. *Id.* The court concluded that, due to the fact that the railroads would demand BIA

compliant products, the manufacturers had a strong incentive to comply with the BIA and that the preemption of state common law tort claims did not compromise the safety of railroad workers. *Id.*

The Ninth Circuit relied on the language of the BIA and this Court's language in *Napier*, noting that the federal government has "established a comprehensive, national regime of locomotive regulation. This regime – enforced by FELA and the threat of heavy civil penalties – preempts every state effort to establish independent standards for the design, construction and material of locomotives." *Id.* Because this field is broad enough to encompass design defect claims against locomotive equipment manufacturers, the Ninth Circuit held the claims were preempted.

Oglesby v. Delaware & Hudson Ry. Co.: The Second Circuit likewise found BIA's preemption of state law claims. *See Oglesby v. Delaware & Hudson Railway Co.*, 180 F.3d 458 (2nd Cir. 1999). In *Oglesby*, a railroad employee brought a FELA action against his employer and a state common law tort claim against a locomotive manufacturer, claiming he was injured adjusting a cab seat. *Id.* at 460. The district court denied the manufacturer's motion for summary judgment, finding no preemption. *Id.*

The Second Circuit disagreed. The court explained that the field occupied by the BIA includes manufacturers as well as railroads because the scope of the BIA extends to "both the 'design' and 'construction' of a locomotive's parts." *Id.* (citing *Napier*, 272 U.S. at 611). According to the court, the intent of Congress would be best accomplished by including manufacturers in the scope of the BIA because the design and construction of a locomotive parts are left in the hands of the manufacturer. *Id.* The Second Circuit rejected the plaintiff's argument that the BIA only

preempts legislation and regulations but not state common law tort causes of action because the preemption of state common law tort claims is necessary to maintain the "uniformity of the BIA." *Id.* The court noted that "an award of damages can act as a 'potent method of governing conduct and controlling policy.'" *Id.* (quoting *San Diego Bldg. Trades Council Millman's Union, Local 2020 v. Garmon*, 359 U.S. 236, 247 (1959)). Because tort damages can force compliance with a state imposed standard, whether the source of damages comes from a statute or a common law remedy has no relevance. Both sources of regulation force railroad manufacturers to comply with a standard of care established by the state. *Id.*

***First Security Bank v. Union Pacific R.R.*:** The Eighth Circuit has held that state tort claims against railroad manufacturers are preempted. *See First Security Bank v. Union Pacific Railroad*, 152 F.3d 877 (8th Cir. 1998). In *First Security Bank*, the plaintiff was the administrator of the estate of a woman who was killed when her car was struck by a train at a railroad crossing. *Id.* at 878-879. The plaintiff claimed, in part, that the horn employed on the train that struck the plaintiff's decedent was inadequate to warn a person in a car of her make and model. *Id.* at 880. The district court dismissed the plaintiff's state common law tort claim on the basis of field preemption under the BIA. *Id.*

According to the Eighth Circuit, if each state were to adopt a different standard for triggering liability, the uniformity that was intended by Congress when it enacted the BIA would be subverted. *Id.* (quoting *Law*, 114 F.3d at 910-911). Because the plaintiff's state common law tort claim fell into a field of regulation that had been occupied by the federal government, the Eighth Circuit held that the plaintiff's claim was preempted. 152 F.3d at 880-81.

***Springston v. Consolidated Rail Corp.*:** The Sixth Circuit addressed the preemptive scope of the BIA and found that state common law tort law claims against railroad manufacturers are preempted. *Springston v. Consolidated Rail Corp.*, 130 F.3d 241 (6th Cir. 1997). In *Springston*, the plaintiff brought claims against a railroad and train manufacturer after the vehicle in which he was traveling was struck by a train at a rail crossing. *Id.* at 243. The district court granted summary judgment in favor of the manufacturer, and partial summary judgment in favor of the railroad, ruling the plaintiff's claims that the railroad and manufacturer negligently failed to properly equip the train with visual warning devices were preempted. *Id.*

The Eighth Circuit stated that "[w]here Congress intends to occupy a field, state law in that field is preempted." *Id.* (quoting *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 212-13 (1983)). The Eighth Circuit noted that Congress intended to confer the scope of regulating all aspects of locomotive components to the federal government, thereby occupying this field and preempting state control. *Springston*, 130 F.3d at 245. This preemptive effect created by the occupation of this field is extensive and includes state common law tort claims. *Id.*

Because the decisions of the state courts of last resort and the United States Courts of Appeals are unanimous and wholly consistent with the decision of the Ohio Supreme Court below, the denial of the writ is appropriate.

CONCLUSION

For all of the above-stated reasons, the Petition for Writ of Certiorari should be denied.

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No. 04-574

IN THE

Supreme Court of the United States

FOREST L. DARBY,

Petitioner,

v.

A-BEST PRODUCTS COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION FOR RESPONDENT VIAD CORP.

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QUESTION PRESENTED

Are state common-law tort claims against manufacturers of locomotive equipment preempted by the Boiler Inspection Act – enacted with congressional intent to occupy the entire field of locomotive regulation – when such claims relate to the design, construction, or material of locomotives or their parts?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Viad Corp. does not have a parent corporation, and there is no publicly held company that owns ten percent or more of its stock.

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STATEMENT OF THE CASE

In general, petitioner's Statement of the Case correctly describes the substance of petitioner's proposed state law claims and the holdings of the trial court, the Ohio Court of Appeals, and the Ohio Supreme Court that the claims are preempted. (Petition for Writ of Certiorari ("Pet.") 1-3, 10-12.)[1]

SUMMARY OF ARGUMENT

There is no issue that warrants this Court's review. *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605 (1926), holds that the Boiler Inspection Act (BIA),[2] now codified at 49 U.S.C. §§ 20701-20903, occupies the field of all matters "within the scope of the authority delegated to the [Interstate Commerce] Commission" – now the Secretary of Transportation – including "the design, the construction, and the material of every part of the locomotive," *i.e.*, the "entire locomotive . . . and all parts and appurtenances thereof." *Id.* at 608, 611, 613. *See also* Petitioner's Appendix ("Pet. App.") 14a-15a. The BIA therefore preempts all state law – including common-law tort claims against locomotive equipment manufacturers – in the field, as it must. Otherwise, railroads would have to change locomotives and their parts

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[1] Petitioner wrongly states that his original complaint alleges claims against "Respondents" (Pet. 1-2). The original complaint alleged no claims against respondents, and the courts below denied leave to add respondents as defendants because the claims petitioner sought to assert against them are preempted.

[2] The BIA is now called the Locomotive Inspection Act (LIA) and is also referred to in some court decisions as the FLIA or LBIA. It is referred to herein as the BIA.

as trains crossed state lines or conform to the rule of the most exacting state, a burden Congress deemed intolerable.

Napier disposes of the case at bar. Petitioner's state law claims attack the locomotive "design" that called for asbestos, the "construction" that used it, and the "materials" themselves, and petitioner does not claim otherwise. They accordingly fall squarely within the Secretary's authority and so, the Ohio Supreme Court properly held, within the preempted field.

That is true whether the state law under which the duty is imposed is common-law or not, and is also true whether the claim is made against the railroad operator or the locomotive manufacturer. It has been settled for over forty years that tort claims are designed to regulate and affect conduct in the same manner as statutes and regulations, and so tort claims are preempted just as statutes and regulations are. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 246-47 (1959) ("The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."). Moreover, inasmuch as the BIA speaks to locomotive design, construction, and material, the manufacturers that design and construct locomotives and their parts are necessarily at the center of that field. Thus, as a practical matter, state law imposing duties on manufacturers must be preempted, lest the uniformity required by federal law be destroyed.

The petition therefore presents no issue meriting the exercise of this Court's certiorari jurisdiction. The decision of the Ohio Supreme Court does not conflict with a decision of this Court or of any federal court of appeals or state appellate court of last resort. Four circuit courts – the Ninth,

Eighth, Sixth, and Second Circuits – and three state supreme courts – Alabama, California, and West Virginia – have previously considered the precise question presented here, *see infra* at 8-9, and all reached the identical conclusion: state common-law tort claims against a locomotive manufacturer are preempted by the BIA pursuant to *Napier*. Moreover, the state cases all concerned asbestos. So settled is the preemptive scope of the BIA as to petitioner's claims that this Court has denied certiorari to review the decisions of three of these courts – the Second Circuit in *Oglesby v. Delaware & Hudson Ry. Co.*, 180 F.3d 458 (2d Cir.), *cert. denied sub nom. Oglesby v. General Motors Corp.*, 528 U.S. 1004 (1999), the Sixth Circuit in *Springston v. Consolidated Rail Corp.*, 130 F.3d 241 (6th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998), and the California Supreme Court in *Scheiding v. General Motors Corp.*, 22 Cal. 4th 471, *cert. denied*, 531 U.S. 958 (2000) – as well as the decision of the Indiana Court of Appeals in *In re Train Collision at Gary, Indiana*, 670 N.E.2d 902 (Ind. App. 1996), *appeal denied sub nom. Dillon v. Chicago Southshore & South Bend R. Co.*, 683 N.E.2d 591 (Ind.), *cert. denied sub nom. Dillon v. Northern Indiana Commuter Transp. Dist.*, 522 U.S. 914 (1997).

In short, *Napier*'s application here presents no conflict, or important question, or any question truly in dispute at all.

REASONS FOR DENYING THE PETITION

I. Settled Law Preempts Petitioner's Claims

For 78 years, since Justice Brandeis' opinion for the Court in *Napier*, it has been settled that Congress intended the BIA to preclude all state law respecting locomotives and locomotive parts and equipment used in interstate commerce. 272 U.S. 605.

Napier held that Congress intended the BIA "to occupy the field" in respect to all areas subject to the BIA, and that the BIA accordingly preempted all state law within the BIA's grant of authority to the Interstate Commerce Commission – whose successor is the Secretary of Transportation, via the Federal Railroad Administration[3] (FRA). *Id.* at 611, 613. Those areas include "the entire locomotive and tender and all parts and appurtenances thereof," including "the design, the construction, and the material of every part." *Id.* at 608, 611. The Court found that the BIA conferred on the Commission "general" power to regulate locomotive safety equipment and that the BIA's grant to the Commission of that general power preempted all state law falling within the scope of the Commission's authority. *Id.* at 611-13.

The Court further found that the state laws at issue were "within the scope of the authority delegated to the Commission" by the BIA, *id.* at 611, and so were preempted

[3] In 1966 the power originally granted to the ICC was transferred to the Secretary of Transportation. Department of Transportation Act, Pub. L. 89-670, § 6(e)(1), 80 Stat. 931 (1966). *See generally Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1152 (9th Cir. 1983). The FRA, a part of the Transportation Department, exercises this power. 49 C.F.R. § 1.49(c)(5), (g) (2004).

regardless whether they conflicted with a federal rule, or whether there was any applicable federal rule at all:

> **It is also urged that, even if the Commission has power to prescribe** an automatic fire box door and a cab curtain, **it has not done so, and that it has made no other requirement inconsistent with the state legislation. This, also, if true, is without legal significance.** The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the act delegating power. We hold that state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field. The broad scope of the authority conferred upon the commission leads to that conclusion. . . . [R]equirements by the States are precluded, however commendable or however different their purpose.

272 U.S. at 613 (emphasis added). In sum, "[i]f the protection now afforded by the Commission's rules is deemed inadequate, application for relief must be made to it." *Id.*

Congress preempted the field for good reason. Locomotives must cross state lines routinely, so the subject "is peculiarly one that calls for uniform law." *See Pennsylvania R. v. Pub. Service Comm'n*, 250 U.S. 566, 569 (1919) (Holmes, J.) (mail cars).

> This broad preemptive sweep is necessary to maintain uniformity of railroad operating standards across state lines. Locomotives are designed to travel long distances . . . through interstate commerce. The virtue of uniform national regulation "is self-evident: locomotive companies need only concern

> themselves with one set of equipment regulations and need not be prepared to remove or add equipment as they travel from state to state."
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> * * *
>
> If each state were to adopt different liability-triggering standards, manufacturers would have to sell locomotives and cars whose equipment could be changed as they crossed state lines, or adhere to the standard set by the most stringent state. Either way, Congress' goal of uniform, federal railroad regulation would be undermined.

Law v. General Motors Corp., 114 F.3d 908, 910-11 (9th Cir. 1997) (citation omitted); *accord Springston*, 130 F.3d at 245; *Swift & Co. v. Wickham*, 230 F. Supp. 398, 407-08 (S.D.N.Y. 1964) (Friendly, J.), *appeal dismissed*, 382 U.S. 111 (1965), *aff'd*, 364 F.2d 241 (2d Cir. 1966), *cert. denied*, 385 U.S. 1036 (1967); *Scheiding*, 22 Cal. 4th at 483; Pet. App. 15a.

In addition, Congress gave petitioner – a railroad worker – a potent remedy for his alleged injuries that does not undermine the BIA's goal of uniformity. *Law*, 114 F.3d at 912. It lies against his employer, under the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 *et seq.*[4] "This remedy is strong

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[4] Every common carrier by railroad while engaging in commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliance, machinery, track, roadbed, works, boats, wharves, or other equipment.

medicine." *Law*, 114 F.3d at 912. Under it, a worker may recover the same compensatory damages as are available at common law where "employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 506 (1957). FELA demonstrates how Congress intended railroad workers injured on the job would be compensated, and shows why its decision to preempt is sensible.

Petitioner's contention (Pet. 23-24) that preempting tort claims leaves no recourse for passengers and bystanders is not an issue in this case. Petitioner is a former railroad employee, and so eligible to bring a FELA claim against his former employer. The argument also goes nowhere. Federal law occupies the field and alone can impose duties. *See Spinelli v. Gaughan*, 12 F.3d 853, 858 (9th Cir. 1993) ("Once Congress has chosen to preempt the state claim, it's free to give affected individuals a full federal claim, a claim providing only for remedies limited to equity, a damages claim only, *or no claim at all.*") (emphasis added).[5]

[5] Thus in *Forrester v. American Dieselelectric, Inc.*, 255 F.3d 1205, 1209-10 (9th Cir. 2001), the Ninth Circuit expressly rejected the plaintiff's argument "that *Law* preempts only claims by railroad employees, not persons who have no remedy under the [FELA]." *Forrester* observed that *Marshall, First Security Bank v. Union Pacific R. Co.*, 152 F.3d 877 (8th Cir. 1998), and *Springston* all had previously "held a common-law claim of a motorist against a railroad arising out of a crossing accident, to the extent it was based on the railroad's inadequate warning devices, [to be] preempted by the Act." *Id.* Accordingly, even as against railroads, all common-law claims within the preempted field – including petitioner's parade of horribles, *viz.*, that the "scope of resulting immunity from tort claims will be endless" (Pet. 24) – are barred by the BIA; and only railroad workers

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II. There is No Conflict in the Appellate Courts

Contrary to petitioner's argument (Pet. 3) that the "Supreme Court of Ohio did not follow this Court's directives concerning proper preemption analysis," the Ohio court got it exactly right, adhering to an unbroken line of authority from federal courts of appeals and state appellate courts of last resort that follow *Napier* without exception and hold that the BIA preempts state common-law and statutory claims against railroad operators and locomotive manufacturers related to the design, construction, or material of locomotives and their parts – the field the BIA occupies. *Forrester*, *supra* (9th Cir.) (BIA preempts non-employee product liability actions against manufacturer of locomotive cranes); *Law*, *supra* (9th Cir.) (quoting *Garmon;* BIA preempts design defect and failure to warn claims against manufacturer concerning engine insulation and brake noise); *Marshall*, *supra* (9th Cir.) (Kennedy, J.) (BIA preempts common-law claims for failure to install warning devices on locomotive); *First Security*, *supra* (8th Cir.) (BIA preempts state common-law remedies against railroad manufacturers for injuries arising out of alleged design defects); *Springston*, *supra* (6th Cir.) (BIA preempts common-law claims against manufacturer);

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can obtain BIA relief under FELA. There is therefore nothing particularly remarkable about the determination that, because of BIA field preemption, all common-law claims of whatever nature against locomotive manufacturers – which are not subject to FELA – should likewise be barred. In sum, railroad workers have a statutory remedy, but only against their employers, which are 100 percent liable through FELA. *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135, 165-66 (2003). For all others – such as passengers, motorists, and bystanders – BIA field preemption simply precludes all remedies against both railroads and manufacturers.

United Transp. Union v. Foster, 205 F.3d 851 (5th Cir. 2000) (BIA preempts statute requiring engine be equipped with signal devices); *Missouri Pacific R. Co. v. Railroad Comm'n of Texas*, 833 F.2d 570 (5th Cir. 1987) (BIA preempts state requirement for emergency equipment); *Consolidated Rail Corp. v. Pennsylvania Pub. Util. Comm'n*, 536 F. Supp. 653 (E.D. Pa.), *aff'd*, 696 F.2d 981 (3d Cir. 1982), *aff'd*, 461 U.S. 912 (1983) (BIA preempts state statute requiring locomotive speed indicators); *Oglesby*, *supra* (2d Cir.) (BIA preempts employee common-law claims against locomotive seat manufacturer); *General Motors Corp. v. Kilgore*, 853 So. 2d 171 (Ala. 2002) (BIA preempts claims against manufacturer for use of asbestos in locomotive parts); *Norfolk Southern Ry. Co. v. Denson*, 774 So. 2d 549 (Ala. 2000) (BIA preempts state law claim seeking to hold locomotive manufacturer liable for failure to install air conditioning); *Scheiding*, *supra* (Cal.) (BIA preempts railroad workers' tort claims against manufacturer for asbestos-related injuries); *Mickleson v. Montana Rail Link, Inc.*, 999 P.2d 985 (Mont. 2000) (BIA preempts common-law claims against railroad concerning locomotive equipment); *In re West Virginia Asbestos Litigation*, 215 W. Va. 39, 592 S.E.2d 818 (2003) (BIA preempts state tort law claims against manufacturers of locomotives and asbestos-containing parts and components thereof).[6]

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[6] *See also Key v. Norfolk Southern Ry. Co.*, 228 Ga. App. 305 (1997) (BIA preempts common-law claims against railroad by employee injured in fall from locomotive steps); *Central of Georgia R. Co. v. Markert*, 200 Ga. App. 851, *cert. denied*, 200 Ga. App. 895 (1991) (same); *Dillon (In re Train Collision)*, *supra* (Ind. App.) (BIA preempts common-law claims against manufacturer); *Furlough v. Union Pacific. R. Co.*, 766 So. 2d 751 (La. App. 2000), *writ denied*, 781 So. 2d 556 (La. 2001) (BIA regulation of locomotive ditch lights); *Carter v. Consolidated Rail Corp.*, 126 Ohio App. 3d 177, *appeal*

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Accord Pet. App. 15a (quoting *West Virginia Asbestos Litigation*, 529 S.E.2d at 822, and finding that, through the BIA, Congress "occupied the field of railroad safety so pervasively" that "any other path" was "blocked by an avalanche of adverse authority from other jurisdictions, both state and federal").

III. Common-Law Tort Claims Fall Within the Field Preempted by the BIA

Despite the uniform adverse authority, petitioner argues (Pet. 13-16) that *Napier* is inapplicable because it addresses only statutory claims, not tort claims. However, it has been settled for over four decades that tort claims are intended to affect conduct, regulate just as statutes and regulations do, and are accordingly preempted as statutes and regulations are:

> Our concern is with delimiting areas of conduct which must be free from state regulation if

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denied, 82 Ohio St. 3d 1413 (1998) (BIA preempts common-law claims arising from alleged asbestos exposure); *In re Amtrak "Sunset Limited" Train Crash in Bayou Canot, Alabama, on September 22, 1993*, 188 F. Supp. 2d 1341 (S.D. Ala. 1999) (BIA preempts passenger and employee common-law negligence and design defect claims against manufacturer); *Roth v. I&M Rail Link, L.L.C.*, 179 F. Supp. 2d 1054 (S.D. Iowa 2001) (BIA preempts state common-law tort claims against manufacturer in action brought by widow of employee crushed in collision); *Eldridge v. Missouri Pacific R. Co.*, 832 F. Supp. 328 (E.D. Okla. 1993) (BIA preempts negligence claim based on inadequate locomotive warning devices); *Seaman v. A.P. Green Ind., Inc.*, 184 Misc. 2d 603 (N.Y. Sup. Ct. 2000) (cited by the Ohio Supreme Court in the case at bar and in *Kilgore* and *West Virginia Asbestos Litigation*; BIA preempts common-law asbestos claims against manufacturer).

> national policy is to be left unhampered. Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme.

Garmon, 359 U.S. at 246-47.

That continues to be true. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992) (quoting *Garmon*). This Court has repeatedly held that ordinary preemption principles apply to common-law damage actions. *Geier v. American Honda Motor Co.*, 529 U.S. 861, 868-69, 872 (2000) (products liability claim preempted; "ordinary pre-emption principles, grounded in longstanding precedent" dating back at least to *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), will continue to be applied in determining whether or not there is "pre-emption of state tort suits"); *Buckman v. Plaintiffs' Legal Committee*, 531 U.S. 341, 352 (2001) (common-law claim for personal injuries preempted; "ordinary" preemption principles applied); *see Cipollone*, 505 U.S. at 521-23 (common-law failure to warn claims alleging personal injury preempted); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 491 (1987) (common-law nuisance claims preempted); *Norfolk Southern Ry. Co. v. Shanklin*, 529 U.S. 344, 358 (2000) (Federal Railway Safety Act "pre-empts respondent's state tort claim"); *see also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385 (1992) ("there is little reason why state

impairment of the federal scheme should be deemed acceptable so long as it is effected by the particularized application of a general [damages] statute").

This is as it must be. The prospect of tort damages would compel manufacturers to make, and railroads to buy, locomotives complying with judicially imposed tort duties. Fifty states' – and their juries' – varying notions of railroad "safety" would impose precisely the patchwork of varying state laws, and *ad hoc* regulation by juries, that Congress intended to preclude. *Law*, 114 F.3d at 910-11; *accord Oglesby*, 180 F.2d at 462 (preemption of common law is "necessary to keep the locus of regulation at the federal level and maintain the uniformity that is a goal of the BIA"); *Kilgore*, 853 So. 2d at 176; *Scheiding*, 22 Cal. 4th at 480; *West Virginia Asbestos Litigation*, 592 S.E.2d at 823-24.

Still, petitioner argues (Pet. 15), "Congress could not have possibly ... intended that the BIA would preempt common law claims" against locomotive manufacturers because those claims did not exist in 1911, before the advent of strict liability. This argument misses the point. Congress occupied the field of locomotive parts and equipment. State law is precluded from that occupied field whether the law precedes the occupation or comes after it; Congress' occupation of the field is not an invitation for new state law to intrude on it.[7] Indeed, *Napier* disposes of the argument;

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[7] *See Scheiding*, 22 Cal. 4th at 480:

> But this reasoning proves too much: Equally logically, Congress could not have intended to preserve that which did not exist. Furthermore, the BIA was enacted as an amendment to the [FELA] ..., which significantly

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the state statutes there were enacted after the BIA, yet this Court found them preempted. *Id.* at 607. But, if Congress could only preserve federal supremacy by re-endorsing field preemption after strict liability was introduced, it did so here. Congress restated in 1970 that the BIA preempts the field, and it recodified the BIA in 1994, expressly preserving existing precedent on the subject such as *Napier* and *Marshall*, 720 F.2d 1149 (BIA preempts tort claims).

In short, *Napier* has been the law for over 75 years, and petitioner cites no case from any appellate court that questions *Napier*'s controlling force over common-law claims against locomotive manufacturers.

IV. The Statutory Scheme: The BIA Applies to Railroad Manufacturers

Petitioner's speculation (Pet. 8-9) that Congress intended to exclude manufacturers from the cloak of preemption for state tort claims – by originally including manufacturers under the BIA but then intentionally deleting them – misunderstands the legislative history of the statute. The 1910 legislative bill would have required manufacturers to indent on each plate of a boiler the manufacturer's name and location, as well as a strength rating; however, Congress dropped the provision after testimony revealed that such

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> expanded the ability of railroad workers to seek recourse for on-the-job injuries. . . . Having enlarged the basis for recovery under federal law, Congress reasonably could have intended to restrict it under state law.

(Citations omitted).

indentations were unnecessary and would cause damage.[8] S. 236 § 2, 61st Cong. 2d sess. (1910); *Bills Affecting Interstate Commerce: Hearings Before the Comm'n on Interstate and Foreign Commerce of the House of Representatives*, 61st Cong. Part V at 317 (1910). Significantly, there is no indication that Congress intended to repudiate the federal primacy of the BIA or to subject locomotive manufacturers, but not operators, to state law.

Additionally, that the 1988 amendment added the language "any person" to augment the penalty provision simply has no relevance to the preemptive scope of the BIA as respects manufacturers. In order to effectuate Congress' goal of a nationally uniform standard of regulating locomotive equipment, claims against manufacturers must be preempted, and are preempted, for the same reasons claims against railroads are: "[i]mposing tort liability on railroad equipment manufacturers would ... [force] them to conform to [state standards, thereby] ... transfer[ring] the regulatory locus from the secretary of transportation to the state courts – a result the BIA was clearly intended to foreclose." *Law*, 114 F.3d at 911-12. *See also* Pet. App. 16a, quoting *Law*. Thus, it is *what*, not *who*, is regulated that is determinative. *See Taylor AG Ind. v. Pure-Gro*, 54 F.3d 555, 562 (9th Cir. 1995). The BIA's field preemption covers the "design, the

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[8] In addition, the 1910 bill was a precursor to the original BIA, which did not occupy the field. *Napier*, 272 U.S. at 611. Amendments by different Congresses years later – in 1915 and 1924 – did occupy the field. *Id.* An off-point decision by Congress in 1910 is irrelevant to the intent of later Congresses that decided to occupy the field. *Cf. Russello v. United States*, 464 U.S. 16, 26 (1983) (rejecting "views of a subsequent Congress" as "basis for inferring the intent of an earlier one") (citations omitted).

construction, and the material of every part of the locomotive," *Napier*, 272 U.S. at 611, and since those things "are in the hands of a manufacturer," Congress' intent to preempt that field "would be accomplished best by including the manufacturer within the statute's coverage." *Oglesby*, 180 F.3d at 462; *Law*, 114 F.3d at 911-12.

Nor does the "overall structure of the BIA" (Pet. 9), as interpreted by *Lorincie v. Southeastern Pennsylvania Transp. Auth.*, 34 F. Supp. 2d 929, 934 (E.D. Pa. 1998), further petitioner's argument that locomotive manufacturers fall outside the BIA's regulatory framework. This anomalous federal district court decision relied in substantial part on *Viad Corp. v. Superior Court*, 64 Cal. Rptr. 2d 136 (Ct. App. 1997), which was thereafter overruled by the California Supreme Court in *Scheiding*, and on *Oglesby v. Delaware & Hudson Ry. Co.*, 964 F. Supp. 57 (N.D.N.Y. 1997), which was thereafter reversed by the Second Circuit. *Lorincie* was expressly rejected by the Second Circuit in *Oglesby*, 180 F.3d at 462, and has not been favorably cited in any reported decision. Indeed, every reported case to consider *Lorincie* has rejected it. *Oglesby*, 180 F.3d at 462; *Roth*, 179 F. Supp. 2d at 1061; *Kilgore*, 853 So. 2d at 176.

V. The Ohio Supreme Court's Preemption Analysis Follows Established Precedent

In the face of the "avalanche" of precedent applying *Napier* to preclude petitioner's claims, the Ohio Supreme Court need not – as petitioner urges (Pet. 3) – have "examine[d] each of petitioner's common-law claims" in accordance with *Cipollone*, 505 U.S. 504, or "return[ed] to the language and legislative history of the BIA" pursuant to

Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996).[9] *Cipollone* and *Medtronic* do not in any way support petitioner's thesis; both cases involve express, not field, preemption and both hold that common-law tort claims are subject to preemption. *Cipollone*, 505 U.S. at 521-23 (common-law failure to warn claims alleging personal injury preempted); *Medtronic*, 518 U.S. at 502-03 (common-law duties preempted to same extent as statutes or regulations).

Petitioner's assertion (Pet. 3) that the Ohio Supreme Court should have examined the BIA's language and history to determine whether Congress specifically intended to

[9] Petitioner's suggestion (Pet. 3 n.3; 19 n.9) that the preemption issue is "unanswered" is flat wrong. This Court in *Napier* long ago answered the preemption issue presented here. Additionally, it has been firmly established by overwhelming case law following *Napier* that common-law tort claims against locomotive manufacturers are preempted by the BIA. *See supra* at 8-9. In any event, petitioner's theory (Pet. 3 n.3; 19 n.9) that this Court may not rely on "judge made common law" but must return to the federal statute itself to ascertain congressional intent is without any legitimate support and appears designed merely to obstruct informed decision-making. Indeed, in *English v. General Electric Co.*, 496 U.S. 72 (1990), the case cited by petitioner, this Court rejected petitioner's argument herein by noting that its decision was premised on prior "case[s] in which the Court has had occasion to consider the extent to which the Congress has pre-empted the field of nuclear safety." *Id.* at 80. Moreover, all that Tribe, *American Constitutional Law*, § 6-28, p. 1177 – cited by petitioner – meant in stating that "preemption analysis is . . . a matter of precise statutory construction rather than an exercise in free-form judicial policymaking" was that "courts in general, or the Supreme Court in particular," should not feel "liberate[d]," in determining the preemptive effect of federal statutes, "from a sense of fidelity to law, or from the judicial duty of interpreting what a given law means." *Id.* It cannot be doubted, as Tribe agrees, that attention to precedent is a part of that duty, particularly in "the context of statutory construction." *Id.* at § 3-3, p. 251.

preempt each of his common-law tort claims misunderstands field preemption. Field preemption "by definition means congressional intent generally extends beyond the express terms of the statute and regulations to all aspects coming within their contemplation." *Carrillo v. ACF Ind., Inc.*, 20 Cal. 4th 1158, 1168 (1999); *see also Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), citing *Napier*, 272 U.S. at 611 (Congress' intent to occupy a field exclusively may be inferred where "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject"). Congress' relevant "intent," therefore, in occupying the field is to "exclude state regulation" from the field. *English*, 496 U.S. at 79-80 n.5.

Hence, *Napier* did not inquire whether Congress had specifically considered curtains and fire doors; state law respecting them was preempted because the requirements were within the "broad scope of the authority conferred upon the Commission." 272 U.S. at 611. Likewise, *Law*, *First Security*, *Springston*, *Oglesby*, *Kilgore*, *Scheiding*, and *West Virginia Asbestos Litigation* found state law claims preempted regardless of whether Congress had considered the particular equipment or claims there at issue, or even tort claims generally. Indeed, *Scheiding* was exactly correct: "*Napier* has long established that Congress 'intended to occupy the field' of locomotive equipment," and to the extent plaintiffs desire to avoid application of that preemption to tort law, "they assume the burden of demonstrating a contrary congressional intent." 22 Cal. 4th at 481.

The Ohio Supreme Court correctly reiterated these principles – "The court [in *Napier*] recognized that Congress indeed had manifested the intention to 'occupy the entire field of regulating locomotive equipment' .. ." – and rightly

agreed with the West Virginia Supreme Court of Appeals that Congress' occupation of the field is so pervasive "as to justify a finding of preemption of that field." Pet. App. 15a (citation omitted).

Petitioner's next contention (Pet. 3), that the Ohio court "ignored the strong presumption against preemption," is untrue. There is no such presumption in areas historically regulated by the federal government, such as railroads. *United States v. Locke*, 529 U.S. 89, 108 (2000) (an "'assumption' of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence"). Indeed, petitioner's own cases have no application to his proposition. *See CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 665-70 (1993) (where federal law expressly provided for state jurisdiction, state law respecting local grade-crossing signals, a subject over which states "traditionally" exercise responsibility, was not preempted); *cf. Rice*, 331 U.S. at 230 (presumption against preemption applied because statute at issue, the Federal Warehouse Act, legislated in field traditionally occupied by the states). Here, there is no question that locomotive regulation involves "a history of significant federal presence." *Locke*, 529 U.S. at 108. Locomotive design, construction, and materials have been subject to exclusive federal regulation since *Napier* was decided three-quarters of a century ago. *Napier*, 272 U.S. at 611-13; *see also United Transp. Union v. Long Island R. Co.*, 455 U.S. 678, 687-88 (1982) ("Railroads have been subject to comprehensive federal regulation for nearly a century. . . . There is no comparable history of longstanding state regulation . . . of the railroad industry.").

Likewise, petitioner can find no solace in his argument (Pet. 3) that the presumption against preemption is especially

strong where the traditional police power of the states is concerned. *Napier* itself establishes that the BIA preempts health-and-safety laws with respect to locomotives and their parts. The states there defended their laws on the ground that they sought to "prevent sickness and disease." 272 U.S. at 612. Nonetheless, this Court held they were preempted "however commendable or however different their purpose." *Id.* at 611-13. In other words, because locomotive regulation is historically a federal field, no presumption against preemption exists merely because petitioner claims personal injuries. *Buckman*, 531 U.S. at 347-48 (no presumption against preemption of personal injury claim said to stem from fraud on federal agency; "Policing fraud against federal agencies is hardly a field which the States have traditionally occupied . . . such as to warrant a presumption against finding federal pre-emption of a state-law cause of action.") (citation omitted). Thus, as to locomotives, no presumption against preemption exists.

Finally, petitioner, citing to the dissent in the Ohio Supreme Court, argues (Pet. 4-5, 25) that inasmuch as asbestos is no longer in use, tort actions for injuries allegedly sustained by asbestos exposure would have no effect on the design, construction, or material of locomotives. This argument makes no sense. When locomotives were made, asbestos was lawful. No state could forbid the manufacturer from using asbestos or punish the manufacturer in tort for using it. Punishing the manufacturer decades after the fact for not discharging a duty it did not have decades before and could not discharge decades later would make the punishment illegal. *See Scheiding*, 22 Cal. 4th at 482 ("plaintiffs' lawsuits would have a retroactive regulatory effect by now allowing design control the BIA denied the

state at the time of manufacture").[10] The FRA intended no such thing; to the contrary, it has explicitly found regulation of asbestos unwarranted. *See* FRA Report to Congress, *Locomotive Crashworthiness and Cab Working Conditions* (1996).[11] Respondent's Appendix 2a, 7a, 13a.

VI. Recent Case Law – *Cipollone*, *Silkwood*, and *Sprietsma* – Does Not Change the Preemptive Scope of the BIA as Defined by *Napier* and Its Progeny

Petitioner (Pet. 16-19) relies on *Cipollone*, *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), and *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002), to support his assertion that *Napier* is limited only to the preemption of state legislation regulating locomotives, not common-law tort remedies. These cases do not further petitioner's argument.

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[10] *See also Landgraf v. USI Film Products*, 511 U.S. 244, 265, 280 (1994) (because "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly," changes in federal law do not have retroactive effect "absent clear congressional intent favoring such a result"); *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 584 (1981) (because of "the danger of conflict" and the "usurpation of federal authority," plaintiffs' claims for higher payments barred even though rates in question no longer applicable and therefore any award could not threaten national uniformity).

[11] In particular: "While previous locomotive design incorporated the use of asbestos, and older locomotives remaining in service may still contain limited amounts of asbestos, there is no evidence that the presence of asbestos poses a problem to humans or the environment." Thus, "FRA does not feel that further action with respect to the presence of asbestos in locomotive cabs is warranted at this time," and "recommends no action be taken on the issue of asbestos in locomotives."

In *Cipollone*, this Court interpreted the term "regulation" in the context of, and as that term is used in, the statute's express preemption clause. 505 U.S. at 519. That interpretation, therefore, is not one of general application, especially so here, where there is no express preemption clause and no reference in the BIA to "regulation."[12] Moreover, *Cipollone* held that "common-law damage actions," being "premised on the existence of a legal duty," necessarily impose "requirements or prohibitions" and so are preempted. *Id.* at 521-23 (plurality opinion of four Justices), 548-49 (Scalia, J., agreeing on this point); *accord Napier*, 272 U.S. at 613 (*requirements* by the states as respect locomotive regulation are precluded).

Petitioner gets no further in arguing that common law is not preempted under *Silkwood*, 464 U.S. 238. In *Silkwood*, federal legislation made clear that "persons injured by nuclear accidents were free to utilize existing tort law remedies." *Id.* at 251-52. The legislative history showed that Congress assumed such remedies would be available and the "right of the State courts to establish the liability .. . in the normal way [was] maintained." Indeed, the "entire discussion surrounding" amendment to the Act "was premised on the assumption that state remedies were available." 464 U.S. at 251, 253-54. Thus, *Silkwood* was grounded in specific statutory evidence that Congress did not intend to preempt tort claims. There is no such evidence here.

Similarly, *Sprietsma* turns on specific statutory evidence that Congress intended to preserve tort claims. The statute there expressly *saved* "liability at common law" from

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[12] *See Locke*, 539 U.S. at 111, recognizing "the greater pre-emptive force" of field preemption.

preemption, and the only reference in the legislative history to field preemption predated the addition of the savings clause. 537 U.S. at 62-65, 69-70. Also, the statute's express preemption clause "d[id] not cover common-law claims," further evidencing Congress' intent not to preempt them in the first place. 537 U.S. at 62-63, 67-70. Indeed, the express preemption clause did not preempt anything at all absent a regulation on point, there was no such regulation, and the Coast Guard expressly stated that its decision not to regulate did not have any preemptive effect. 537 U.S. at 65-69. Obviously, Congress did not intend to preempt what it expressly saved, let alone on a subject that was not preempted at all. That has nothing to do with the BIA, which (1) preempts all state law in its field, (2) is part of a statutory scheme that creates an exclusive federal tort claim under FELA, and (3) contains no evidence that Congress intended to preserve state common-law tort claims.

VII. All State Law in the Field is Preempted; It Matters Not Whether There is a "Direct and Substantial" Effect on the Federal Scheme

Contrary to petitioner's contention (Pet. 19), *English*, 496 U.S. 72, does not require a "direct and substantial effect" on a federally regulated matter before state law is preempted. *English* holds that Congress' relevant "intent" in occupying the field is "to exclude state regulation" – all of it – from the field, so *any* state law in the field necessarily "conflicts with" Congress' intent. 496 U.S. at 79-80 n.5. In that case, the federal government preempted state law prompted by nuclear safety concerns but specifically saved state laws with "purposes other than protection against radiation hazards." 496 U.S. at 84 (quoting 42 U.S.C. § 2021(k) (1982)). This Court held a state law preempted if either (1) it had a safety

purpose or (2) although not motivated by safety concerns and so on its face preserved, it had a "direct and substantial effect" on safety decisions. 496 U.S. at 84-85. Thus, contrary to petitioner's argument, the "direct and substantial effect" language *preempted* state law otherwise preserved; it did not *save* state law otherwise preempted, as petitioner urges.[13]

Indeed, when *English* later focused on tort claims, it merely echoed *Silkwood*'s observation that Congress had expressly made clear that tort law was not within the field preempted by the Atomic Energy Act. 496 U.S. at 85-86. Here, Congress did no such thing. Thus, in the end, *English* and *Silkwood* are besides the point – as is *Medtronic*, 518 U.S. 470, which involves express preemption and turns on the scope of that statute's express preemption clause, not on a distinction between tort law and other laws. There, the majority of Justices held that tort claims are preempted like other state laws: "[I]nsofar as the [Medical Device Amendments] pre-empt[] a state requirement embodied in a state statute, rule, regulation, or other administrative action, [they] would also pre-empt a similar requirement taking the form of a standard of care or behavior imposed by a state tort action." 518 U.S. at 504-05 (Breyer, J., concurring);

[13] Petitioner additionally argues (Pet. 23) under *English* that preemption "does not arise unless a defendant is subjected to inconsistent duties, 'or where it is impossible to comply with both federal and state requirements.'" Petitioner has the standard wrong. *English* does not so state, and *Geier*, 529 U.S. 861, 868-69, explicitly rejects the notion. In any event, to the extent petitioner means to equate field with conflict preemption, he is at odds with two hundred years of Supreme Court law. Actually, his argument is circular, and so, as his own cases demonstrate, ends where it begins: Congress' relevant "intent" in occupying the field is "to exclude state regulation" from the field, so *any* state law in the field necessarily "conflicts with" that intent and is preempted. *English*, 496 U.S. at 79-80 n.5.

accord 518 U.S. at 510-11 (O'Connor, J., joined by Rehnquist, Scalia & Thomas, JJ., dissenting) (preemption clause "clearly pre-empts any state common-law action that would impose a requirement different from, or in addition to, that applicable under the FDCA – just as it would pre-empt a state statute or regulation that had that effect").

In any event, petitioner's claim would be preempted even under his own proposed test. "[S]tate-law claims would have a direct and substantial effect on the uniformity of locomotive design, construction, and material mandated by Congress through the BIA." *Scheiding*, 22 Cal. 4th at 481. If each state adopted different liability-triggering standards, locomotives would have to change equipment at the border or carry equipment required by the most stringent state's law, thus interfering with Congress' goal of uniform federal regulation. *Law*, 114 F.3d at 910-11.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

Locomotive Crashworthiness and Cab Working Conditions

Report to Congress

U.S. Department of Transportation

Federal Railroad Administration

Office of Safety Assurance and Compliance

September 1996

CHAPTER 10

Other Factors Affecting Locomotive Cab Working Conditions

FRA examined locomotive crew exposure to vibration and asbestos. Vibration can cause visual acuity problems and, when significant and/or combined with other factors, physiological effects. FRA conducted a review of open literature on the subject matter, and this chapter provides a summary of the findings.

FRA believes the best way to evaluate cab vibration is to conduct instrumented vibration measurements and studies, evaluate whether new cab designs successfully reduce vibration levels, and—if applicable—develop vibration guidelines.

Appendix

The two primary locomotive manufacturers stopped using asbestos in their locomotives in the 1970's, and FRA has not identified sources of friable asbestos to which crew members could be exposed. Based on this fact and the small number of earlier vintage locomotives still in use, asbestos is not considered an issue.

In addition to the working conditions addressed in previous chapters, FRA also evaluated two other factors that are not currently covered in FRA regulations, but which can affect the working conditions aboard locomotives—vibration and asbestos. This chapter discusses the source of vibration and asbestos in current locomotives, the health and safety effects associated with their presence, and recommended actions to minimize or eliminate these effects on the performance of the locomotive crew.

Vibration

Vibration—and its associated effects on health, proficiency, and comfort—is inescapable given current locomotive design. The Volpe National Transportation Systems Center (VNTSC) and FRA have identified three major sources of vibration in locomotive cabs[1]:

- reciprocating equipment (engines, compressors, alternators, superchargers and the like);

* * *

1. "Human Factors Guidelines for Evaluation of the Locomotive Cab," prepared by Jordan Multer, Robert Rudich, and Kevin Yearwood, U.S. Department of Transportation, Research and Special Programs Administration, John A. Volpe, Volpe National Transportation Systems Center, Cambridge, MA 02142.

- conduct vibration measurements and studies[10];
- determine whether vibration may physiologically and/or psychologically harm the locomotive crew over an extended period of time;
- evaluate whether new cab designs successfully address reduced vibration levels in locomotive cabs; and
- develop applicable vibration guidelines.

Asbestos

Review of Existing Asbestos Research and Literature[11]

Asbestos is a filamentous mineral useful because of its resistance to heat. Its primary use earlier in this century was as an insulating material, but in more recent years it has found widespread use in a number of other industries.

When asbestos is inhaled and deposited in the alveoli[12], it is ingested by macrophages[13], and via mechanisms that are not

10. Measurements of operational vibrations on all three axes, including those in the 1 to 10 Hz range, are needed to determine actual vibration conditions in the cab. Once these levels are known, the need and potential benefit of more extensive—and expensive—control can be determined.

11. Industrial Toxicology: Safety and Health Applications in the Workplace; Edited by Phillip L. Williams & James L. Burson, 1985.

12. Alveoli is an air sac of the lungs at the termination of a bronchiole.

13. Macrophage is a large phagocytic cell of the reticuloendothelial system.

currently clear, lead to the development of diffuse lung damage and the formation of fibrosis. Asbestos can lead to the development of a malignant tumor of the lining of the chest cavity and lung surface called mesothelioma, and, in association with cigarette smoking, can lead to an increased incidence of bronchogenic carcinoma.

The diagnosis of asbestosis depends upon a well-documented history of exposure, an accurate estimate of the degree of exposure, and a characteristic clinical picture. The patterns of impairment seen with asbestos exposure usually take 20 to 40 years to develop. There is evidence that lower exposure can lead to the development of mesothelioma. Individuals who develop moderate to severe degrees of asbestosis have a poor prognosis, and those who develop malignant mesothelioma have exceedingly poor outlook in that mesothelioma cannot be removed surgically, nor is it amenable to irradiation therapy or chemotherapy. The outlook for those individuals who develop associated bronchogenic carcinoma is the same for those who develop lung cancer and who have not been exposed to asbestos—that is, the 5-year survival rate is about 5 to 10 percent.

The long-term health consequences of this exposure are unknown. It is highly unlikely that this small degree of exposure could lead to the development of the interstitial fibrotic pattern of impairment, but there is a possibility that such exposure could lead to an increased incidence of mesothelioma and, in smokers, to an increased incidence of bronchogenic carcinoma.

Appendix

OSHA: Final Asbestos Rules[14]

In the August 10, 1994 *Federal Register*, OSHA published final regulations to protect workers from exposure to asbestos. The rules, which cover four million workers and are estimated to cost $361.2 million annually, went into effect on October 11, 1994. This OSHA rule applies to railroad operating employees.

At a press conference at OSHA headquarters, Assistant Secretary of Labor (OSHA), Joseph A. Dear said the rules will ensure effective long-term management of asbestos. OSHA has reduced the permissible exposure limit (PEL) from 0.2 fibers per cubic centimeter of air as an 8-hour time-weighted average to 0.1 fibers per cubic centimeter.

Asbestos in the Locomotive Cab

When steam generators were used on locomotives in passenger service, asbestos cement was used to insulate the heater coils to prevent loss of heat and contain the fire. Whenever the steam generator was disassembled and the coils had to be removed, the asbestos cement was broken up and removed, releasing asbestos particles which could be inhaled into the lungs. This source of asbestos was eliminated in the 1970's, when the head end power system was developed for the heating of passenger trains with electricity.

GE and EMD, the two primary manufacturers of current locomotives, made the following statements regarding asbestos in their locomotives:

14. Occupational Hazards, Sept. 1994, OSHA: Final Asbestos Rule Covers 4 Million Workers.

- GE[15] stated that asbestos has not been permitted in any facet of their locomotive production since October 1979. In addition, GE stated that there is no record of asbestos ever being used in the cab environment of its locomotives. Further, GE informed each of their outside suppliers in mid-1987 that all sub-assemblies provided for the production of locomotives must be free of asbestos.

- EMD[16] stated that of their 12 specification for sound and thermal insulation applications, only one contained asbestos as a filler with a resin bonded fiberglass and only fiberglass was used as a loose insulating material. An EMD service bulletin was issued on April 6, 1984, prohibiting the use of asbestos for any purpose in locomotive construction. This restriction also is applied to outside contractors supplying sub-assemblies for the production of locomotive construction depending upon the location. EMD had identified 60 pages of part numbers which contained asbestos in some form in previous locomotive construction; however, these parts have been discontinued.

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15. Mr. R. Shults, Manager-Product & Environment Impact, General Electric Company (GE).

16. Mr. Widdman, Electro Motive Division (EMD).

Appendix

Conclusions

FRA has reviewed literature outlining the known health and safety effects of asbestos exposure, and contacted representatives from both primary locomotive manufacturers regarding the present and past use of asbestos in the construction of locomotives. While previous locomotive design incorporated the use of asbestos, and older locomotives remaining in service may still contain limited amounts of asbestos, there is no evidence that the presence of asbestos poses a problem to human or the environment. The use of asbestos in locomotive production was terminated many years ago, and both primary manufacturers currently have policy statements prohibiting the use of asbestos in locomotive construction. Based on the above, FRA does not feel that further action with respect to the presence of asbestos in locomotive cabs is warranted at this time.

Appendix

CHAPTER 12

Findings and Implementation Strategy

FRA believes railroad safety will be best served by having regulatory action that is founded on consensus among those who are benefitted and/or burdened by the agency's regulation. The actions are divided into one of three categories for each key area:

- *initiate rulemaking to either adopt new standard or revise existing standard;*
- *work with industry to develop design/performance guidelines; or*
- *take no action.*

Broad Implementation Strategy

The Rail Safety Enforcement and Review Act mandated that FRA conduct a proceeding to determine the need for action on locomotive crashworthiness and working conditions. This mandate followed frequent expressions of concern by employee organizations and recommendations of the National Transportation Safety Board.

FRA has conducted a detailed research and analysis program as described in the preceding chapters, and conducted field examinations and inspection in an effort to determine the

benefits and, where available, the direct costs[1] of each crashworthiness feature or working condition improvement identified in the Act. Based on information obtained through these efforts, FRA identified the following general options for actions with respect to each individual area:

* * *

The ideas set forth in the Appendices are neither standards nor guidelines, but rather concepts intended to provide the basis for concrete and detailed discussion of options for overall improvements in locomotive cab safety.

Locomotive Cab Working Condition Improvement Implementation

Partnership Opportunities

FRA found that locomotive builders and operating railroads are taking steps to improve the working conditions in

1. This report does not include a detailed, economic cost-benefit analysis for each identified alternative. Such analysis necessarily includes a quantified evaluation of the predicted cost savings based on expected decreases in future losses when compared to a historical review of accidents involving locomotives not equipped with advanced crashworthiness protection systems. As such, this report does not present a thorough examination of the "total" costs associated with implementation of a particular crashworthiness feature. Rather, the costs presented indicate only the costs associated with the physical construction and/or implementation of that feature onto an existing locomotive, and should not be misconstrued to provide an evaluation of the economic feasibility of implementing the particular crashworthiness feature.

locomotive cabs. However, historically railroad operations have required train crews to work for long periods of time in an environment that would be expected to accelerate the onset of fatigue. The noise level in many locomotives is not conducive to effective communication and may contribute to long-term hearing loss of crew members, if exposure is sustained and repetitive and if personal protective equipment is not properly employed.

In hot weather, the temperature in a locomotive cab can reach levels that are recognized to cause rapid heat exhaustion and an accompanying drop in human performance. A combination of lack of cleaning and maintenance by railroads and/or abuse by crew members causes the sanitary facilities in many locomotives to be in deplorable condition. The industry needs to take additional action to improve these conditions.

The research and analysis done in response to the Act supports further work in concert with the industry parties to address temperature extremes in the locomotives cab and toilet areas. Literature on human performance suggests that more strictly controlling cab temperature would provide greater confidence in the capacity of crew members to perform their duties safely and efficiently. Remedial measures based on use of the "heat stress index," which includes the combined effects of high temperature and high humidity on human performance, could offer several potential health and safety benefits including:

- minimizing human errors due to heat stress;

- reduced cab noise, because windows can be closed during warm weather;

- improved cab air quality; and

- reduced risk of flying or thrown objects entering the cab through open windows.

Avoiding extremes of temperature will also aid in providing adequate, functioning sanitary facilities.

The results of FRA's survey of locomotive cab noise levels, when compared with existing governmental standards and literature on noise-induced hearing loss, suggest that noise levels during some locomotive assignments are sufficiently high to raise significant concerns. In the past few years, major railroads have instructed employees to wear personal hearing protection and have placed employees in hearing conservation programs. Newer locomotives have been designed to reduce noise exposure, but retirement of older locomotives will take many years; and many regional and short line railroads use older locomotives as the mainstay of their fleets.

FRA will work with the industry parties and others having expertise in this field toward more appropriate noise exposure standards that are centered on prevention of hearing loss. The current noise standards for locomotive cabs given in 49 CFR 229 have not kept pace with standards applicable to other workplaces, and opportunities for sharing information within the railroad industry regarding positive approaches to hearing conservation have not yet been exploited. A more active response by FRA to occupational noise exposure will be a major outcome of this study.

Appendix

Other issues that warrant concerted effort by FRA, employee organizations, manufacturers and suppliers, and the railroads include:

- cab sanitary facilities;
- cab ergonomics;
- cab seat design; and
- cab air quality.

Current regulations address these issues only with respect to basic cab seat safety and venting of exhaust gasses. Yet each falls clearly within the intent of the locomotive inspection statute to the extent it bears on the health and safety of crew members or the safe operation of the train.

Appendices K, L and M give respective examples of starting points for a cooperative effort with industry to develop approaches to each of these cab working condition improvements. FRA will work with our industry partners to develop appropriate approaches to these issues. FRA developed the cab sanitary facilities recommended practices given in Appendix K from the observations made by FRA inspectors during the cab working conditions survey done to support this report to Congress. The cab ergonomics guidelines given in Appendix L are based on a cab ergonomics study conducted by the Volpe National Transportation System Center, and discussions with Amtrak and the Burlington Northern Railroad. A concept for cab seat guidelines is given in Appendix M.

Appendix

No Action

FRA recommends no action be taken on the issue of asbestos in locomotives, except to the extent any new information requires that the issue be reopened. FRA found that friable asbestos has not been used as a material in the construction of locomotives for ten years or more. Locomotive builders are careful to avoid the use of asbestos in new and rebuilt locomotives. Asbestos remaining in older units is believed to be encapsulated in individual components or systems. FRA could find no evidence of asbestos being a health problem for crews of older locomotives.